Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-21-174 OF 1996
JAMES FOONG J
11 AUGUST 2000

Civil Procedure *— Action — Capacity to sue — Plaintiffs executed loan agreement cum assignment by way of equitable charge to financial institutions — Whether absolute — Whether rights and interests in sale and purchase agreements transferred to assignors — Whether plaintiffs able to maintain right to sue — Civil Law Act 1956 s 4(3)*

Tort *— Negligence — Collapse of apartment block — Appointment of unqualified architect — Unqualified architect representing himself as qualified must be judged according to character he had assumed — Duty of care to purchasers and occupants of units — Whether duty breached*

Tort *— Negligence — Collapse of apartment block — Duty of care of developer — Appointment of unqualified architect — Whether duty on developer to ensure architect appointed is competent — Whether duty breached — Whether developer liable for default or negligence of architect*

Tort *— Negligence — Collapse of apartment block — Duty of care of developer — Inadequate retaining walls and drainage system — Whether developer should have foreseen damage to occupants*

Tort *— Negligence — Collapse of apartment block — Duty of care of owner of surrounding land — Failure to maintain proper water-courses on own land — Whether damage foreseeable*

Tort *— Negligence — Collapse of apartment block — Foreseeability — Duty of engineer to ensure safety of buildings — Danger of landslide producing lateral load against foundation of building — Whether duty of care breached*

Tort *— Negligence — Local authority — Collapse of apartment block — Immunity — Whether local authority's post-collapse acts / omissions despite obvious knowledge of instability of apartment block amounted to breach of duty of care — Whether immunity apply — Street, Drainage and Building Act 1974 s 95(2)*

Tort *— Negligence — Pure economic loss — Whether claimable*

Tort *— Nuisance — Collapse of apartment block — Failure of developer to maintain drainage system and retaining walls resulting in damage to plaintiffs — Whether nuisance proved*

Tort *— Nuisance — Local authority — Collapse of apartment block — Unreasonable user of land in failing to maintain stream post-collapse which was under its care — Whether foreseeable to cause damage to plaintiffs*

Highland Towers, constructed sometime between 1975 and 1978, consisted of three blocks 12-storey high apartments named as Block 1, 2 and 3 respectively. Directly behind the three blocks was a rather steep hill with a stream ('the east stream'). On 11 December 1993, Block 1 collapsed. Immediately after the collapse of Block 1, the residents of Block 2 and 3 were prevented from entering their apartments by the local authority for fear of the instability of these two buildings. The purchasers/owners of Block 2 and 3 issued a writ against ten defendants: the first defendant was the developer of the three apartment blocks; the second defendant was the purported architect of Highland Towers; the third defendant was the engineer of Highland Towers; the fourth defendant was the local authority who had the jurisdiction over the Highland Towers site and the surrounding areas; the fifth defendant was the registered owner of 50 lots of bungalow land ('the Arab Malaysian land') directly at the rear of Highland Towers; the sixth defendant (Tropic) was a company that carried out clearing works on the Arab Malaysian land; the seventh defendant was the registered owner of a piece of land ('the Metrolux land') situated on top of a ridge just above the Arab Malaysian land and at the material time was under development; the eight defendant was the provider of management services to the seventh defendant to develop the Metrolux land; the ninth defendant was the state government of Selangor; and the tenth defendant was the Director of Land and Mines of the State of Selangor.

The plaintiffs' claim was for damages caused jointly and/or severally by the acts and/or omissions of the defendants, their servants and/or agents in causing and/or contributing to the collapse of Block 1 and thereby forcing the plaintiffs to evacuate and abandon Block 2 and 3. The cause of action relied on by the plaintiffs against the defendants were negligence, nuisance and the liability under *Rylands v Fletcher*.

There were two conflicting theories advanced on the cause of the failure of Block 1. Supporting the plaintiffs' contention was Dr Weeks and on the side of the fifth defendant was Prof Simons. The significance of these two theories was the belief that it would affect the liabilities of the parties, particularly of the first and fifth defendant. If Dr Weeks' version was accepted, then it was contended that the cause of failure emanated from the fifth defendant's land. Professor Simons, on the other hand, insisted that it originated form the first defendant's property.

The defendants raised the following preliminary issues: (i) plaintiffs 44 to 73 had no right to bring the action against the defendants by virtue of s 4(3) of the Civil Law Act 1956 since their rights had been assumed by the financial institutions in favour of which a loan agreement cum assignment had been executed; and (ii) the claim of the plaintiffs could not be maintained because it was a claim for pure economic loss, the two apartments being the defective products.

The ninth and tenth defendants raised the following preliminary points: (i) citation of the wrong party — the ninth defendant should be the State Director; and (ii) particular officer or officers not named — by the provision of ss 5, 6(1), 6(4) and 18 of the Government Proceedings Act, the particular officer or officers in the government who committed the tortuous wrong must be identified, otherwise the claim against the tenth defendant must fail.

Held:

(1) With recognition by such high authority of such loan agreement cum assignment to be an equitable charge, the court saw no reason why the word 'charge' in s 4(3) of the Civil Law Act should not include equitable charge of this nature. For after all, this equitable charge was specie of a charge. Thus when this instrument of assignment purported to be by way of a charge, the effect of s 4(3) of the Civil Law Act was no longer applicable. Further, after perusing the loan agreements cum assignments, the court could not interpret them to be absolute assignments by the plaintiffs to the financial institutions. Though the word 'absolute' appeared in the documentation of the loan agreements cum assignments, there were also other clauses to show that the rights and interests in the sale and purchase agreements so assigned have not been transferred to the assignors. Besides, by the principle of equity of redemption, the plaintiffs were also able to maintain their right to sue (see pp 220G–221A, F).

(2) After due consideration, the court was more inclined to adopt Prof Simons' interpretation that the landslide that brought down Block 1 of Highland Towers was a rotational retrogressive slide emanating from the High Wall behind the second tier car park. The court found that water must have been a major factor in causing the collapse of the high wall and the landslide that followed (see pp 234G, 235D).

(3) When the second defendant had represented himself as a qualified architect to all and sundry, as displayed by his actions, then he must be judged according to the character he had assumed. At the time when this defendant exercised his duty as an architect for the Highland Towers project, he must have foreseen that the apartments he built would be sold, and purchasers, their servants and/or agents would be occupying them. Thus these purchasers would be closely and directly affected by his acts and/or omissions and for this, he must have or ought to have them in contemplation when he was directing his mind to his acts and/or omissions. By this, the court found a duty of care existed between the second defendant and the plaintiffs and from the facts of the case, it was obvious that the second defendant had breached his duty of care to the plaintiffs (see pp 241A, C–E, 243C).

(4) When you had a hill so close and acute then the third defendant should have reasonably foreseen, judging by professional standard as an engineer responsible for the structure of Block 1, the danger

A of a landslide producing a lateral load against the foundation of the building. For this, he should have exercised care to either design and construct a foundation to accommodate lateral load or ensure that the slope was reasonably stable. Failure to do so was a breach of his duty of care he owed to the plaintiffs since his duty was to ensure the safety of the buildings he designed and built B (see p 246G–H).

(5) As a general rule, an employer of independent contractor is not liable for the default or negligence of such a contractor. But here the plaintiffs were focusing on the appointment of such personalities, not after they were appointed. This means that C before their appointment, there was a duty placed upon the first defendant to vet through them to ensure that they were competent and possessed such skill for the task they were employed to undertake. This involved inquiries and investigations into their credentials and qualifications. Obviously, these were not done. Despite being notified by the second defendant that he was not a D qualified architect, the first defendant proceeded to engage him and even allowed him to appoint the third defendant as the consultant engineer for the project. This was surely negligent on the part of the first defendant (see pp 248H–249B).

(6) When implementing works of terracing of the slope and E construction of retaining walls and drains on both the Arab Malaysian land and the Highland Towers site, the first defendant must have reasonably foreseen that such works, if insufficient and ineffective, would cause the collapse of Block 1 and result in damages to the plaintiffs, who were its neighbours under the principle of negligence. The retaining walls and the drainage F system had been proved to be insufficient and inadequate. The court must conclude that the first defendant had breached his duty of care to the plaintiffs (see p 249B–E).

(7) Like the second and third defendants, the first defendant was liable for nuisance as one of the creators of the nuisance by its acts and/or omissions. Further, as an owner of the Highland Towers G site, it had not been a reasonable user of its land for it failed to maintain the drainage system and the retaining walls resulting in the damages suffered by the plaintiffs who were its neighbours (see p 251B–C).

H (8) Judging from the facts as disclosed in the chronology of events, the fourth defendant was negligent of the wrongs as alleged by the plaintiffs. However, since the acts of the fourth defendant were within those specified activities under s 95(2) of the Street, Drainage and Building Act, immunity applied to the fourth defendant (see pp 252H, 255E–F).

I (9) However, the immunity did not apply to the fourth defendant for acts/omissions committed post-collapse. Despite the pressing need and the obvious knowledge of the urgent requirement for a master drainage plan to secure the stability of the slope so as to ensure the safety of the two apartment blocks, the fourth defendant did nothing. This was certainly inexcusable and definitely a breach of duty of care owed by the fourth defendant to the plaintiffs (see pp 256H–I, 259A–B).

(10) By the acts and/or omissions of the fourth defendant, the court also found that the fourth defendant was an unreasonable user of its land in failing to maintain the stream post-collapse which was under its care. Its acts and/or omissions were foreseeable to cause a damage to the plaintiffs — its neighbours. For this, the court found the fourth defendant was also liable to the plaintiffs for nuisance (see p 259E–F).

(11) Since it was already decided that it was due to a landslide caused primarily by water which emanated from the damage pipe culvert and the inadequate and unattended drains on the fifth defendant's land, then the plaintiffs had sufficiently proved that the causa causan of the collapse of Block 1 leading to the forced evacuation of the plaintiffs from Block 2 and 3 was due to the acts and/or omissions of this defendant in not maintaining these water-courses. From the factual circumstances as disclosed, the court found that the fifth defendant could reasonably foresee that by its acts and/or omissions in failing to take care of its land, it would cause a land slide that would destroy Block 1 and forced the abandonment of Block 2 and 3 (see pp 261H–I, 262C–D).

(12) Given the circumstances of this case and applying the common law principle to nuisance, the court was convinced that the fifth defendant caused an actionable nuisance to the plaintiffs (see p 267B–C).

(13) Judging by the facts, the court did not find that the sixth defendant was negligent or committed nuisance. There was no evidence advanced to link the acts of this defendant in excavating and clearing Arab Malaysian land to the cause of the landslide that tumbled Block 1 (see p 268C–D).

(14) The assertion of the seventh and eight defendants during submission that they should not be made responsible for the acts of their independent contractors was an after thought for it was never pleaded in the statement of defence. Further, even if this issue was allowed to be raised, the defendants were not exempted from the liabilities for the acts of their independent contractors. The factual situation in the present case showed that it fell within the exception to the general rule, ie non-delegable duty covering cases involving extra hazardous acts or omissions (see pp 276G, 277D–E).

(15) As property developer and/or manager of development projects on a hill, the seventh and eight defendants must have known or

A ought to have known that by diverting watercourses on their land to the east stream, they would increase the volume of discharge to this outlet. With an extensive area of their land denuded of trees, they must have foreseen that water flowing over this area would carry with it eroded soil and silt which would be deposited down stream. And as proved, these caused or contributed to the B collapse of Block 1 and forced evacuation of Block 2 and 3 (see p 280F–G).

(16) In the factual matrix of this case, the water at the Metrolux site was naturally on the land but the defendants had artificially erected barriers on their land to redirect its natural flow path into C the east stream which consequently caused the damage suffered by the plaintiffs. Such acts of the defendants were closely and directly connected to the damage and for this, the seventh and eight defendants must be liable to the plaintiffs (see p 281H).

(17) For the purpose of this case, in respect of claims arising out of D rivers, streams or watercourses, very little difference was made since the State Director, who was the tenth defendant, was already a party to this action. However concerning matters arising out of the ownership and/or occupier of the surrendered lands, the situation was different. The plaintiffs had not in their pleadings E alleged that the tenth defendant was the person being sued this particular aspect of the claim. The plaintiffs' statement of claim repeatedly and distinctively asserted that the tenth defendant was brought in as a party to this suit 'by virtue of the fact that the property in stream and watercourses on Arab Malaysian land and its surrounding was vested in the state authority of Selangor'; F never as a State Director to the surrendered lands. Thus, the claim of the plaintiffs against the ninth defendant must failed in respect of drainage matters but maintainable against the tenth defendant. But for the surrendered lands, the plaintiffs' claim must fail against both defendants (see pp 284G–285A).

G (18) The statutory provision implies a need to identify and distinguish the officer or officers concerned before the plaintiffs can proceed with attributing liability to the government. In the situation at hand, only the drainage and irrigation department was named in respect of matters related to drainage. Such defects were too serious and fundamental for such proceedings against the H government to succeed; it must fail for non-compliance of the legislative provisions laid down for such action against a state government. By this, the plaintiffs' claim against the ninth and tenth defendants must fail (see p 287A–D).

(19) On the issue of 'pure economic loss', following *Dr Abdul Hamid* I *Abdul Rashid & Anor v Jurusan Malaysian Consultants* [1997] 3 MLJ 546, the court held that claim for pure economic loss can be maintained against the defendants (see p 244H).

(20) From the evidence tendered, the court was without doubt that all defendants, except number sixth, ninth and tenth, were joint tortfeasors in causing the same damage to the plaintiffs. For this, contribution could be recovered from each other (see p 288A).

[**Bahasa Malaysia summary**

Highland Towers yang telah dibina antara tahun 1975 dan 1978 meliputi tiga blok pangsapuri 12 tingkat yang dinamakan sebagai Blok 1, 2 dan 3 masing-masing. Di belakang tiga blok ini adalah sebuah bukit yang agak curam dengan aliran anak sungai ('anak sungai timur tersebut'). Pada 11 Disember 1993, Blok 1 runtuh. Selepas runtuhnya Blok 1, penghuni-penghuni Blok 2 dan 3 dihalang dari memasuki pangsapuri mereka oleh pihak berkuasa awam kerana risau akan ketidakstabilan kedua-dua bangunan tersebut. Pembeli-pembeli/pemilik-pemilik Blok 2 dan 3 telah mengeluarkan writ terhadap sepuluh orang defendan. Defendan pertama adalah pemaju tiga blok pangsapuri; defendan kedua adalah arkitek Highland Towers; defendan ketiga adalah jurutera Highland Towers; defendan keempat adalah pihak berkuasa yang mempunyai bidang kuasa ke atas tapak Highland Towers dan kawasan di sekelilingnya; defendan kelima adalah tuan punya berdaftar 50 lot tanah banglo ('tanah Arab Malaysian') secara terus di belakang Highland Towers; defendan keenam (Tropic) adalah sebuah syarikat yang menjalankan kerja-kerja menerangkan tanah di atas tanah Arab Malaysian; defendan keenam adalah tuan punya berdaftar sebidang tanah ('tanah Metrolux') yang terletak di atas suatu rabung ke atas tanah Arab Malaysian dan pada semua masa matan sedang dimajukan; defendan kelapan adalah pembekal perkhidmatan-perkhidmatan pengurusan kepada defendan ketujuh untuk memajukan tanah Metrolux; defendan kesembilan adalah kerajaan negeri Selangor; defendan kesepuluh adalah Pengarah Tanah dan Galian Negeri Selangor.

Tuntutan plaintif adalah untuk gantirugi yang diakibatkan secara bersama dan/atau berasingan oleh tindakan-tindakan dan/atau kelalaian defendan-defendan, kakitangan-kakitangannya dan/atau ejen-ejen di dalam menyebabkan dan/atau menyumbang kepada runtuhan Blok 1 dan dengan itu memaksa plaintif-plaintif untuk berpindah keluar dan meninggalkan Blok 2 dan 3. Kausa tindakan yang digantung harap oleh plaintif-plaintif terhadap defendan-defendan adalah kecuaian, kacau-ganggu dan liabiliti di bawah *Rylands v Fletcher*.

Terdapat dua teori yang bertentangan yang dikemukakan berkenaan dengan keruntuhan Blok 1. Menyokong penegasan plaintif adalah Dr Weeks dan di pihak defendan kelima adalah Prof Simons. Kepentingan kedua-dua teori ini adalah kepercayaan bahawa ia akan menjejaskan liabiliti-liabiliti pihak-pihak terutamanya defendan pertama dan kelima. Jika versi Dr Weeks diterima, maka ia adalah

ditegaskan bahawa punca kegagalan adalah dari tanah defendan kelima. Sebaliknya Profesor Simons menegaskan bahawa ia adalah berpunca dari hartanah defendan pertama.

Defendan-defendan membangkitkan isu-isu awalan berikut: (i) plaintif ke 44 sehingga 77 tiada hak untuk membawa tindakan tersebut terhadap defendan-defendan menurut s 4(3) Akta Undang-Undang Sivil 1956 kerana hak mereka telah diambil oleh institusi kewangan di mana suatu perjanjian pinjaman dan serah hak telah dilaksanakan; dan (ii) tuntutan plaintif tidak boleh dipertahankan kerana ia adalah kerugian ekonomi tulen, dua pangsapuri tersebut adalah produk yang defektif.

Defendan kesembilan dan kesepuluh telah membangkitkan perkara-perkara awalan yang berikut: (i) menamakan pihak yang salah — defendan kesembilan sepatutnya merupakan Pengarah Negeri; dan (ii) pegawai atau pegawai-pegawai berkenaan tidak dinamakan — menurut peruntukan ss 5, 6(1), 6(4) dan 18 Akta Prosiding Kerajaan pegawai atau pegawai-pegawai berkenaan mestilah dikenal pasti, jika tidak tuntutan terhadap defendan kesepuluh mestilah gagal.

Diputuskan:

(1) Dengan pengiktirafan oleh mahkamah atasan yang begitu tinggi akan suatu perjanjian pinjaman dan serah hak sebagai gadaian ekuiti, mahkamah tidak dapat melihat mengapa perkataan 'gadaian' di dalam s 4(3) Akta Undang-Undang Sivil tidak sepatutnya memasukkan gadaian ekuiti berbentuk ini. Lagi pun, gadaian ekuiti ini adalah satu spesis gadaian. Oleh itu, apabila instrumen serah hak yang dikatakan melalui suatu gadaian, kesan s 4(3) Akta Undang-Undang Sivil tidak lagi terpakai. Selanjutnya, selepas membaca perjanjian-perjanjian pinjaman dan serah hak, mahkamah tidak boleh menafsirkannya sebagai serah hak mutlak oleh plaintif-plaintif kepada institusi kewangan. Walaupun perkataan 'mutlak' terdapat di dalam dokumen perjanjian pinjaman dan serah hak, juga terdapat fasal-fasal yang lain untuk menunjukkan hak dan kepentingan perjanjian jual beli tersebut yang telah diserah hak belum lagi dipindahkan kepada penyerahhak. Lagi pun menurut prinsip penebusan ekuiti, plaintif-plaintif juga boleh mengekalkan hak mereka untuk mendakwa (lihat ms 220G–221A, F).

(2) Selepas pertimbangan yang wajar, mahkamah lebih cenderung untuk menerima tafsiran Prof Simons bahawa runtuhan tanah yang menjatuhkan Blok 1 Highland Towers adalah runtuhan mundur secara bergilir-gilir yang berpunca dari Dinding Tinggi di belakang hujung tempat letak kereta yang kedua. Mahkamah mendapati bahawa air merupakan faktor utama yang menyebabkan runtuhan dinding tinggi dan runtuhan yang berikut (lihat ms 234G, 235D).

(3) Apabila defendan kedua mengatakan dirinya sebagai arkitek yang layak di dalam semua perkara, seperti yang ditunjukkan oleh tindakan-tindakannya, beliau mestilah dihakimi menurut kemahiran yang diandaikannya. Pada masa defendan melaksanakan kewajipannya sebagai arkitek untuk projek Highland Towers, beliau mestilah menjangkakan bahawa pangsapuri yang beliau bina akan dijual dan pembeli-pembeli, wakil-wakil dan/atau ejen-ejennya akan menghuni di situ. Dengan itu, pembeli-pembeli tersebut akan secara rapat dijejas terus oleh tindakan-tindakan dan/atau ketinggalan-ketinggalan dan untuk ini, beliau mestilah atau sepatutnya memikirkan perkara ini apabila beliau mengarahkan pemikiran kepada tindakan-tindakan dan/atau ketinggalan-ketinggalan. Dengan ini, mahkamah mendapati suatu tugas berhati-hati wujud antara defendan kedua dan plaintif-plaintiif dan dari fakta-fakta kes tersebut, ia adalah jelas bahawa defendan kedua telah melanggar tugas berhati-hatinya kepada plaintif-plaintif (lihat ms 241A, C–E, 243C).

(4) Apabila terdapat sebuah bukit yang sebegitu dekat dan tirus maka defendan ketiga sepatutnya menjangkakan secara munasabah dengan melihat kepada standard profesional sebagai seorang jurutera yang bertanggungjawab untuk struktur Blok 1, bahaya runtuhan tanah yang mengakibatkan bebanan lateral terhadap tapak bangunan tersebut. Untuk ini, beliau sepatutnya melaksanakan hemat sama ada untuk mereka dan membina tapak untuk mengatasi bebanan lateral atau untuk memastikan cerun adalah stabil secara munasabah. Kegagalan berbuat demikian adalah pelanggaran tugas berhati-hati beliau kepada plaintif-plaintif kerana tugasnya adalah untuk memastikan keselamatan bangunan-bangunan yang beliau reka bentuk dan bina (lihat ms 246G–H).

(5) Sebagai suatu peraturan am, seorang majikan bagi seorang kontraktor bebas adalah tidak bertanggungan untuk keingkaran atau kecuaian kontraktor sedemikian. Tetapi di sini, plaintif-plaintif menumpukan perhatian kepada perlantikan orang-orang sedemikian, bukan selepas mereka telah dilantik. Ini bermaksud bahawa sebelum perlantikan mereka, terdapat tugas diletakkan ke atas defendan pertama untuk menyemak mereka untuk memastikan bahawa mereka adalah kompeten dan memiliki kemahiran sedemikian untuk tugas yang mereka digaji untuk jalankan. Ini melibatkan persoalan-persoalan dan siasatan-siasatan ke atas surat tauliah dan kelayakan. Dengan jelas, ini tidak dibuat. Walaupun telah diberitahu oleh defendan kedua bahawa beliau bukanlah arkitek yang layak, defendan pertama masih menggajinya dan membenarkannya untuk melantik defendan ketiga sebagai jurutera pakar runding untuk projek tersebut. Ini adalah secara jelas kecuaian di pihak defendan pertama (lihat ms 248H–249B).

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(6) Apabila menjalankan kerja-kerja meneres di cerun tersebut dan pembinaan dinding sokongan dan saliran-saliran di tapak tanah Arab Malaysian dan Highland Towers, defendan pertama mestilah dapat menjangka secara munasabah bahawa jika kerja-kerja sedemikian adalah tidak mencukupi dan tidak efektif, ia akan menyebabkan keruntuhan Blok 1 dan menyebabkan ganti B rugi kepada plaintif-plaintif yang merupakan jirannya di bawah prinsip kecuaian. Dinding sokongan dan sistem saliran telah terbukti tidak mencukupi dan tidak memadai. Mahkamah mestilah menyimpulkan bahawa defendan pertama telah melanggar tugas berhati-hatinya kepada plaintif-plaintif (lihat C ms 249B–E).

(7) Seperti defendan kedua dan ketiga, defendan pertama adalah bertanggungan untuk kacau ganggu sebagai salah satu penyebab-penyebab kacau ganggu melalui tindakan-tindakan dan/atau ketinggalan-ketinggalannya. Selanjutnya, sebagai seorang pemilik tapak Highland Towers ia bukanlah pengguna yang munasabah D ke atas tanahnya kerana ia gagal untuk mengekalkan sistem saliran dan dinding sokongan menyebabkan kerosakan yang dialami oleh plaintif-plaintif yang merupakan jirannya (lihat ms 251B–C).

(8) Menilai daripada fakta-fakta seperti yang didedahkan mengikut kronologi peristiwa, defendan keempat adalah cuai untuk E kesalahan yang dikatakan oleh plaintif-plaintif. Namun, oleh kerana tindakan-tindakan defendan keempat adalah termasuk di dalam aktiviti-aktiviti yang dinyatakan di bawah s 95(2) Akta Jalan, Parit dan Bangunan, imuniti adalah terpakai kepada defendan keempat (lihat ms 252H, 255E–F).

F (9) Namun, imuniti tidak terpakai kepada defendan keempat untuk tindakan-tindakan / ketinggalan-ketinggalan yang dilakukan selepas runtuhan. Walaupun terdapat keperluan yang ketara dan pengetahuan yang jelas akan keperluan segera untuk pelan saliran utama untuk menjamin kestabilan cerun tersebut bagi memastikan keselamatan dua blok pangsapuri, defendan G keempat tidak melakukan apa-apa pun. Ini sudah tentu tidak boleh dimaafkan dan sudah tentu suatu pelanggaran tugas berhati-hati oleh defendan keempat kepada plaintif-plaintif (lihat ms 256H–I, 259A–B).

(10) Melalui tindakan-tindakan dan ketinggalan defendan keempat, H mahkamah mendapati bahawa defendan keempat adalah pengguna yang tidak munasabah ke atas tanahnya kerana gagal untuk mengekalkan anak sungai selepas runtuhan tersebut yang merupakan di bawah jagaannya. Tindakan-tindakan dan / atau ketinggalan-ketinggalannya adalah dijangkakan menyebabkan kerosakan kepada plaintif-plaintif — jirannya. Untuk ini, I mahkamah mendapati bahawa defendan keempat juga adalah bertanggungan kepada plaintif untuk kacau ganggu (lihat ms 259E–F).

(11) Oleh kerana telah pun diputuskan bahawa adalah berpunca daripada runtuhan tanah yang disebabkan secara asas oleh air yang berpunca dari kerosakan paip pembetung dan juga kekurangan atau saliran-saliran yang tidak dijaga di atas tanah defendan kelima, maka plaintif-plaintif telah membukti secara cukup punca runtuhan Blok 1 yang menyebabkan pemindahan secara paksa plaintif-plaintif dari Blok 2 dan 3, adalah berpunca dari tindakan-tindakan dan / atau ketinggalan defendan ini di dalam tidak mengekalkan sistem saliran tersebut. Dari keadaan-keadaan fakta yang didedahkan, mahkamah mendapati bahawa defendan kelima boleh menjangkakan secara munasabah bahawa melalui tindakan-tindakan dan / atau ketinggalan-ketinggalan yang gagal untuk menjaga tanahnya, ia akan menyebabkan runtuhan tanah yang akan memusnahkan Blok 1 dan memaksa Blok 2 dan 3 ditinggalkan (lihat ms 261H–I, 262C–D).

(12) Melihat kepada keadaan-keadaan kes ini dan memakai prinsip common law kepada kacau-ganggu, mahkamah percaya bahawa defendan kelima telah menyebabkan kacau ganggu yang boleh didakwa kepada plaintif-plaintif (lihat ms 267B–C).

(13) Setelah meneliti fakta-fakta, mahkamah tidak mendapati defendan keenam cuai atau telah melakukan kacau ganggu. Tiada keterangan dikemukakan untuk mengaitkan tindakan defendan ini di dalam menggali dan menerangkan tanah Arab Malaysian tersebut sehingga menyebabkan tanah runtuh yang telah merobohkan Blok 1 (lihat ms 267B–C).

(14) Kenyataan tegas oleh defendan-defendan ketujuh dan kelapan semasa penghujahan bahawa mereka tidak sepatutnya dipertanggungjawabkan terhadap tindakan kontraktor bebas mereka adalah merupakan satu yang telah difikirkan kemudian kerana ia tidak pernah diplidkan di dalam pernytaan pembelaan. Tambahan pula, walaupun isu tersebut dibenarkan untuk timbul, defendan-defendan tidak dikecualikan daripada liabiliti terhadap tindakan kontraktor bebas mereka. Keadaan sebenar di dalam kes ini menunjukkan bahawa ia terlingkung di dalam pengecualian daripada rukun am, iaitu kewajipan yang tidak boleh diwakilkan yang meliputi kes-kes yang melibatkan tindakan atau peninggalan yang amat berbahaya (lihat ms 276G, 277D–E).

(15) Sebagai pemaju harta tanah dan/atau pengurus pembangunan projek atas sebuah bukit, defendan-defendan ketujuh dan kelapan semestinya mengetahui atau sepatutnya mempunyai pengetahuan bahawa dengan mengubah laluan air atas tanah mereka ke saliran timur, mereka akan menambahkan isi padu aliran ke saluran ini. Dengan keluasan kawasan tanah mereka di mana pokok-pokok telah digondolkan, mereka sepatutnya dapat menjangka bahawa air yang mengalir atas kawasan ini akan membawa bersama hakisan tanah dan kelodak yang akan berlonggok di hulu sungai. Dan sebagai mana yang dibuktikan,

A inilah yang telah menyebabkan dan menyumbang kepada keruntuhan Blok 1 dan memaksa pemindahan daripada Blok 2 dan 3 (lihat ms 280F–G).

(16) Berdasarkan fakta matriks kes ini, air di kawasan Metrolux berada secara semulajadinya atas tanah tersebut tetapi defendan- B defendan telah secara buatan membina penghalang atas tanah mereka untuk memesongkan aliran asal ke aliran timur yang seterusnya telah menyebabkan kerugian yang dialami oleh plaintif-plaintif. Tindakan sedemikian oleh defendan-defendan secara rapat dan langsung berkait dengan kerugian tersebut dan justeru itu, defendan-defendan ketujuh dan kelapan sepatutnya C bertangunggjawab terhadap plaintif-plaintif tersebut (lihat ms 281H).

(17) Bagi tujuan kes ini, berhubung dengan tuntutan yang timbul akibat daripada sungai, saliran atau arah aliran, hanya sedikit perbezaan yang dibuat memandangkan Pengarah Negeri, yang D merupakan defendan kesepuluh, memang merupakan salah seorang daripada pihak kepada tindakan ini. Namun begitu, perkara-perkara berkaitan yang timbul daripada pemunyaan dan/ atau penghuni tanah yang diserahkembalikan, keadaannya adalah berlainan. Plaintif-plaintif di dalam pliding mereka tidak E mendakwa bahawa defendan kesepuluh adalah orang yang disaman di dalam aspek tertentu tuntutan tersebut. Pernyataan tuntutan plaintif-plaintif telah berulangkali dan dengan jelas menegaskan bahawa defendan kesepuluh merupakan pihak di dalam saman ini 'oleh sebab hakikat bahawa pemunyaan terhadap sungai dan saliran air atas tanah Arab Malaysian dan F persekitarannya terletak pada badan berkuasa negeri Selangor'; bukan sebagai satu Pengarah Negeri kepada tanah yang diserahkembalikan. Oleh itu, tuntutan plaintif-plaintif terhadap defendan kesembilan seharusnya gagal berhubung dengan hal penyaliran tetapi boleh dipertahankan terhadap defendan kesepuluh. Tetapi berhubung tanah yang diserahkembalikan, G tuntutan plaintif-plaintif semestinya gagal terhadap kedua-dua defendan (lihat ms 284G–285A).

(18) Peruntukan statutori memperuntukkan satu keperluan untuk mengenalpasti dan membezakan pegawai atau pegawai-pegawai yang terlibat sebelum plaintif-plaintif boleh meneruskan dengan H anggapan liabiliti ke atas kerajaan. Di dalam situasi ini, hanya jabatan penyaliran dan pengairan disebutkan berhubung dengan perkara yang berkaitan penyaliran. Kecacatan sedemikian terlalu serius dan penting untuk prosiding sedemikan terhadap kerajaan berjaya; ia mestilah gagal kerana ketidakpatuhan peruntukan undang-undang yang diperuntukkan bagi tindakan terhadap I kerajaan negeri yang sedemikian. Dengan itu, tuntutan plaintif-plaintif terhadap defendan-defendan kesembilan dan kesepuluh mesti gagal (lihat ms 287A–D).

(19) Berhubung isu 'kerugian ekonomi tulen, di mana *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants* [1997] 3 MLJ 546 diikuti, mahkamah memutuskan bahawa tuntutan untuk kerugian ekonomi tulen boleh dipertahankan terhadap defendan-defendan (lihat ms 244H). A

(20) Berdasarkan keterangan yang ditenderkan, mahkamah tanpa sebarang keraguan mendapati semua defendan, kecuali nombor enam, sembilan dan sepuluh, adalah pelaku tort bersesama di dalam menyebabkan kerugian kepada plaintif-plaintif. Justeru itu, penyumbangan hendaklah diperoleh daripada satu sama lain (lihat ms 288A).] B

C

Notes

For cases on capacity to sue, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 37–38.

For cases on negligence generally, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 484–1143. D

For a case on negligence of local authority, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) para 757.

For cases on nuisance, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1144–1179.

E

Cases referred to

Adams v Naylor [1946] AC 543 (refd)

Allan William Goldman v Rupert William Edeson Hargrave & Ors [1967] 1 AC 645 (refd)

Allen v Gulf Oil Ltd [1981] AC 1001 (refd) F

Azizah Zainal Abidin & Ors v Dato Bandar Kuala Lumpur [1995] 5 CLJ 565 (refd)

BL Holdings Ltd v Robert J Wood & Partners (1978) 10 BLR 48 (refd)

Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd [1997] 3 MLJ 620 (refd)

Burnie Port Authority v General Jones Pty Ltd 120 ALR 42 (refd) G

Cambridge Water Co Ltd v Eastern Counties Leather plc [1994] 1 All ER 53 (refd)

Canadian National Rly Co v Norsk Pacific Steamship Co Ltd (1992) 91 DLR 289 (refd)

Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd & Anor [1986] AC 1 (refd) H

Capital & Counties v Hampshire CC [1997] 3 WLR 331 (refd)

Cardy v Taylor (1994) 38 Con LR 79 (refd)

Cattle v Stockton Waterworks Co (1875) LR 10 QB 453 (refd)

Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97 (refd)

Datuk Bandar Dewan Bandaraya v Ong Kok Peng & Anor [1993] 2 MLJ 234 (refd) I

Donoughue v Stevenson [1932] AC 562 (refd)

Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants [1997] 3 MLJ 546 (folld)

Eckersley v Binnie (1988) 18 Con LR 1 (refd)

Elliott Steam Tug Co Ltd v Shipping Controller [1922] 1 KB 127 (refd)

Government of Malaysia & Anor v Akasah bin Ahad [1986] 1 MLJ 396 (refd)

Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners [1975] 1 WLR 1095 (refd)

Greenock Corp v Caledonian Rly Co and another appeal [1917] AC 556 (refd)

Home Brewery plc v William Davis & Co (Loughborough) Ltd [1987] 1 All ER 637 (refd)

Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149 (refd)

Hj Abdul Rahman v Government of Malaysia & Anor [1966] 2 MLJ 174 (refd)

Hj Abdul Rahman v Mohamed Hassan [1917] 1 FMSLR 290 (refd)

Hunter & Ors v Canary Wharf Ltd and another appeal [1997] 2 All ER 426 (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Lai Seng & Co v Government of Malaysia & Ors [1973] 2 MLJ 36 (refd)

Leigh & Sillavan Ltd v Aliakmon Shipping Co [1986] 2 All ER 145 (refd)

Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd [1995] 4 MLJ 804 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Matania v The National Provisional Bank Ltd & Anor [1936] 2 All ER 633 (refd)

Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor [1995] 2 MLJ 276 (refd)

Metropolitan Asylum District v Hill (1881) 6 App Cas 193 (refd)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)

Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd [1999] 6 MLJ 220 (refd)

Palmer v Bowman [2000] 1 All ER 22 (refd)

Perunding Alam Bina Sdn Bhd v Errol Oh & Ors [1999] 6 MLJ 101 (refd)

Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd [1952] 1 All ER 1326 (refd)

Pyrenees Shire Council v Day (1998) 72 ALJR 152 (refd)

Rylands v Fletcher (1868) LR 3 HL 330; [1861–73] All ER Rep 12 (refd)

Sedleigh-Denfield v O'Callaghan [1940] AC 880 (refd)

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Simpson & Co v Thomson (1877) 3 App Cas 279 (refd)
Sivasubramanian v Chong Cheong Wah & Anor [1973] 1 MLJ 157 (refd)
Smith v Kenrick [1843–60] All ER Rep 273 (refd)
Smith v Littlewoods Ltd [1987] 2 WLR 480 (refd)
Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors [1995] 3 CLJ 114 (refd)
Steward v West African Terminal Ltd [1964] 2 Llyod's Rep 371 (refd)
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Tara Kumar Ghose v Kumar Arun Chandra Singh AIR 1923 Cal 161; 74 IC 383 (refd)
Utramares v Touche (1931) 255 NY 170 (refd)
Voli v Inglewood Shire Council (1963) ALR 657 (refd)
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Legislation referred to

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Control of Imported Publications Act 1958 s 18
Evidence Act 1950 ss 74, 74(a)(ii), 78(1)(e)
Government Proceedings Act 1956 ss 5, 6(1), (4), 7(3), 18
Internal Security Act 1960
Local Government Act 1976 ss 28, 124
National Land Code ss 49, 16(2), 136(2)(a)(ii)
Public Authorities Protection Act 1948 s 2
Public Authorities Protection Ordinance s 2(a)
Street, Drainage and Building Act 1974 ss 53, 54, 95(2)
Waters Act 1920 s 3

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AD Rajah (*Ms Khoo* with him) (*Khoo & CH Loo*) for the first defendant.

Melvin Selvam (*Sharon Kaur* with him) (*Jagjit Singh & Co*) for the second defendant.

VS Viswanathan (*S Ravichandran* with him) (*VS Viswa & Co*) for the fourth defendant.

Cecil Abraham (*Dhinesh Bhaskaran* with him) (*Sheran Delamore & Co*) for the fifth defendant.

RR Sethu (*Kelvin Kong* with him) (*Heng & Morgan*) for the seventh and eighth defendants.

Mohd Zawawi Salleh (*Selangor State Legal Adviser*) (*Nik Suhaimi Nik Suleiman* with him) for the ninth and tenth defendants.

A **James Foong J**:

Introduction

Highland Towers, as is collectively known, consist of three blocks 12-storey high apartments named simply as Block 1, 2, and 3 respectively. It was B constructed sometime between 1975 and 1978 and the residents who dwelled therein were middle income earners. Directly behind the three blocks was a rather steep hill with a stream flowing west, if it was allowed to follow its natural course. The attraction of this place was the natural surroundings with an extensive view of the city of Kuala Lumpur.

C On Saturday, 11 December 1993, at about 1.30pm , after ten days of continuos rainfall, Block 1 collapsed. When rescue operation was called off after days of searching, 48 people were recorded dead. The nation declared this incident as a national tragedy.

Immediately after the collapse of Block 1 the residents of Block 2 and 3 were prevented from entering their apartments by the local authority having D jurisdiction of the area, the Majilis Perbandaran Ampang Jaya ('MPAJ'), for fear of the instability of these two buildings. A couple of days later, these occupants were allowed in, in restricted number, but only to collect their personal valuables. At that time, even with the presence of the security forces, the apartments were looted. With the eventual passing of time E especially when security was reduced and subsequently withdrawn altogether vandalism became more intense. By 1998, when this court visited the site, every apartment in Block 2 and 3 was completely stripped of contents, including fittings leaving only the naked structure.

MPAJ had issued statutory notice to the purchasers/owners of the apartments of Block 2 and 3 to demolish these two buildings. This was F refused leading to the affected purchasers/owners obtaining from the High Court at Shah Alam an order to set aside this notice. To date Block 2 and 3 remain standing but unoccupied for fear of instability.

Some three years after the Highland Towers tragedy the purchasers/owners of Block 2 and 3 issued a writ against the ten defendants. This is the G case against them.

The defendants

The ten defendants are as follows:

The first defendant was the developer of the three apartment blocks in H Highland Towers and is still the registered owner of the three pieces of land — Lot 494, 495, and 653 in the Mukim of Hulu Klang, District of Gombak, State of Selangor, on which the buildings stood. For purposes of demarcation, I shall refer to this entire land as the Highland Towers Site.

The second defendant was the purported architect of Highland I Towers.

The third defendant, a brother of the second defendant, was the engineer for Highland Towers.

The fourth defendant is and was the local authority, at the material time who had jurisdiction over the Highland Towers Site, the Arab Malaysian land and the surrounding areas.

The fifth defendant is and was, at the material time, the registered owner of 50 lots of bungalow land directly at the rear of Highland Towers. I shall collectively refer to these lots as the Arab Malaysian land.

The sixth defendant ('Tropic') is a company that carried out clearing works on the Arab Malaysian land in late 1978 and early 1979.

The seventh defendant is the registered owner of a large piece of land ('Metrolux land') which is situated on top of a ridge, commonly known as Bukit Antarabangsa. This land is located just above the Arab Malaysian land and at the material time was under development.

The eighth defendant is and was, at all material times, the provider of management services to the seventh defendant to develop the Metrolux land into a housing estate.

The ninth defendant is the State Government Selangor.

The tenth defendant is the Director of Lands & Mines of the Selangor State.

The plaintiffs' claim

The plaintiffs' claim is for damages caused jointly and/or severally by the acts and/or omissions of the defendants, their servants and/or agents in causing and/or contributing to the collapse of Block 1 and thereby forcing the plaintiffs to evacuate and abandon Block 2 and 3.

The causes of action relied on by the plaintiffs against the defendants are: negligence, nuisance, the liability under *Rylands v Fletcher* and breach of statutory duty.

During the course of the plaintiffs' submission, Mr Navaratnam, the leading counsel for the plaintiffs, announced that the plaintiffs are abandoning the last cause of action — breached of statutory duty, leaving only negligence, nuisance and liability under *Rylands v Fletcher*.

At this stage I am of the view that it is pertinent to set out broadly the principles governing these causes of actions so that this court will be focus when analyzing the allege liabilities of the defendants. An amplification of them will be undertaken when I examine each defendant's acts in detail.

Negligence

The liability of negligence as defined by Lord Atkin in the case of *Donoughue v Stevenson* [1932] AC 562 is: that every man must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure his neighbour, ie those persons who are so closely and directly affected by his act that he ought reasonably to have them in contemplation as being so affected when he is directing his mind to the acts or omissions which are called to question, and this results in damage to the neighbour.

A By this, suffice to say, at this stage, that the important elements for the plaintiffs to prove in this cause of action are: causation and foreseeability.

Nuisance

In general, nuisance is a condition or activity which unduly interferes with B the use or enjoyment of one's land. There is public nuisance and private nuisance. In this case we are only concern with private nuisance which is often described as 'unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it', and this takes three forms. The first: is encroachment on a neighbour's land. The second: is direct physical injury to the neighbour's land. And the third: is interference C with the enjoyment of the neighbour's land — see *Winfield & Jolowicz on Tort* (15th Ed) at p 494.

But not all types of nuisance are actionable. Whether a nuisance is actionable depends on a variety of considerations: the character of the defendant's conduct, the act complained of, the effect of the complained act D and such likes. And all these are to be balanced off against the conflicting interests of the parties; that of an occupier in using his land as he thinks fit with that of his neighbour for the quiet enjoyment of his land.

In deciding the defendant's conduct, the test is: reasonableness ie 'according to the ordinary usage of mankind living in ... a particular society E — see *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at p 903. This factor of 'reasonableness' of the defendant's conduct is different from that in negligence. Here it signifies what is legally right between the parties taking account 'all the circumstances of the particular case; the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it was done maliciously or in the reasonable exercise of rights; and F the effect of the commission, that is transitory or permanent, occasional or continuous; so that it is a question of fact whether or not a nuisance has been committed' — *Winfield & Jolowicz on Tort* (15th Ed) at pp 497–498.

Thus 'if the defendant is a reasonable user, he would not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is G not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it.' — Lord Goff in *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 1 All ER 53 at p 70.

Of late another factor is added to this test. It is expounded by the House of Lords in the same case of *Cambridge Water Co Ltd.* Lord Goff introduced it in this way (at pp 71–72):

H

> We are concerned with the liability of a person where a nuisance has been created by one for whose actions he is responsible. Here, as I have said, it is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being founded within the principle of reasonable user. But it by no means follows I that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past sixty years points strongly towards a requirement that such foreseeability should be a prerequisite of liability in damages for nuisance, as it is of liability

> in negligence. For if a plaintiff is in ordinary circumstances only able to claim damages in respect of personal injuries where he can prove foreseeability on the part of the defendant, it is difficult to see why, in common justice, he should be in a stronger position to claim damages for interference with the enjoyment of his land where the defendant was unable to foresee such damage.

I find this added requirement reasonable and I have no reason for not adopting it as part of the common law of this country for this cause of action.

The liability under *Rylands v Fletcher*

The rule expounded by Blackburn J in the case of *Rylands v Fletcher* (1868) LR 3 HL 330; [1861–73] All ER Rep 12 is: 'that the person who for his own purpose brings onto his land and collects and keeps there anything to do with mischief if it escapes must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.' When such a situation is found to exist, then there is no necessity for the plaintiff to prove the negligent act of the defendant; this is a case of strict liability.

However this rule has undergone changes in recent years in the common law practicing countries. Starting with England, the House of Lords in *Cambridge Water Co Ltd v Eastern Counties Leather plc* has added to this principle the necessity to prove that the defendant could have reasonably foresee the thing might, if escape, cause damage to the plaintiff. Then in Australia, in the case of *Burnie Port Authority v General Jones Pty Ltd* 120 ALR 42, the High Court after describing this rule as having 'all its difficulties, uncertainty, qualifications and exception' completely discarded it as an independent cause of action, and incorporated it into the law of negligence. I tend to favour this Australian approach since after the case of *Cambridge Water Co Ltd* the requirement of foreseeability has deprived this independent cause of action of its attractiveness. Since foreseeability is required to be proved, it might as well be absorbed into the liability of negligence.

Objection to the locus standi of plaintiffs number 44–73

The statement of claim has described plaintiffs 44 to 73 as having assigned their rights and interest in their respective apartments in Highland Towers to various financial institutions for consideration of loans granted to them by these financial institutions. The names of these financial houses are disclosed in para 2 of the statement of claim against the amount owed by each of these plaintiffs. As security for these loans, these plaintiffs have executed in favour of these institutions what we commonly called a 'Loan Agreement cum Assignment'. In it, these plaintiffs assigned to these institutions all their rights and interest in their apartments under the sale and purchase agreement they entered with the first defendant . This method of conveyancing was adopted for reason that no individual strata title was issued to the apartments (not even till today) to enable the financiers to

A create a legal charge over them. Seizing on this shortcoming all the defendants except Tropic argued that these 59 plaintiffs have no right to bring an action against the defendants since their rights have been assumed by the financial institutions.

To substantiate this contention s 4(3) of the Civil Law Act 1956 ('the B Act') and the principle as laid down in the case of *Leigh & Sillavan Ltd v Aliakmon Shipping Co* [1986] 2 All ER 145 are highlighted.

Section 4(3) of the Act reads as follows:

> *Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action,* of which C express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, *shall be, and be deemed to have been, effectual in law,* subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act , *to pass and transfer the legal right to* the debt or *chose in action,* from the date of the notice, *and all legal and other remedies for the same,* D *and the power to give good discharge for the same, without the concurrence of the assignor.* (Emphasis added.)

And the principle as expressed by Lord Brandon in *Leigh & Sillavan Ltd v Aliakmon Shipping Co*at p 149 is:

> E in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, *he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred,* and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it. (Emphasis added.)

F In arguing against this objection, Mr Navaratnam, insists that the assignments executed by his clients to the financial institutions are firstly: 'not absolute', and secondly: 'purporting to be by way of charge', thus falling outside the ambit of s 4(3) of the Act.

By these assertions, the question that requires satisfaction, and which G will decide the fate of the defendants' objections, is: whether the assignments in favour of the financial bodies are absolute (not purporting to be a way of charge)? If it is in the negative, then the objections of these defendants must fail.

As a guide to assist this court in its determination of this issue two decisions, one from the then Supreme Court (*Nouvau Mont Dor (M) Sdn* H *Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268), and the other of the Federal Court (*Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149) confirming the approach of its predecessor, are relevant. In the case of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd,* Seah FJ advises that: in deciding on such matter of, 'whether or not the assignment is absolute one (not purporting to be by way of a legal charge I only) within the meaning of 4(3) of the Act is to be gathered only from the four corners of the instrument itself'. It must be recorded that in both these cases, the assignments by the borrowers to the banks for loans granted of

A this nature were ruled absolute (and not purporting to be by way of a legal charge only) rendering the assignors no legal right to bring an action in their own names.

Of late there seems to be substantial number of authorities distinguishing the finding made in *Nouvau Mont Dor* and *Hipparion*, though not the test they set. Particularly visible are the High Courts' decisions in B *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804, *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* [1997] 3 MLJ 620 and *Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd* [1999] 6 MLJ 220. The two latter cases ruled that there was no absolute assignment in the document of assignments before them.

C The various instruments of assignment created by these plaintiffs in favour of their respective financial institutions are tendered in court. Though they are worded in various fashions, but common to all are the following features: (a) it is in consideration for loans granted by the financial institutions to these plaintiffs, as borrowers; (b) there are no individual documents of title issued to the apartments offered as securities for the loans D to enable a legal charge to be created over them; (c) the assignments by these plaintiffs to the financial institutions are of the plaintiffs' rights and interest in the sale and purchase agreements they entered with the first defendant, when they purchased their respective apartments; (d) there are covenants by these financial institutions, as assignors, to reassign the said apartments back to the plaintiffs in the event individual documents of title E are issued, and if the loans are still then subsisting, to create registrable legal charges over the properties so secured; and (e) if individual documents of title were not issued when the loans are repaid the assignors would reassign back the rights and interest in the sale and purchase agreements to the plaintiffs.

F This type of arrangement is presently recognized as an 'equitable mortgage' or even as a 'equitable charge' by the Federal Court in the case of *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97. In fact Peh Swee Chin FCJ in his judgment in the same case accepted such creation despite the existence in this country of the National Land Code which speaks only of a 'charge' with the following statement: G

> The Court of Appeal used the words 'equitable mortgage' in relation to security transaction without restraint, and totally without inhibition in the face of the National Land Code. We support such usage.

With recognition by such high authority of such loan agreement cum assignment to be an equitable charge, I see no reason why the word 'charge' H in s 4(3) of the Act should not include equitable charge of this nature. For after all, is this equitable charge not specie of a charge? Thus when this instrument of assignment purports to be by way of a charge, the effects of s 4(3) of the Act is no longer applicable.

Further, after perusing these loan agreement cum assignments, I honestly, within the four corners of these documents cannot interpret them I to be absolute assignments by these plaintiffs to the financial institutions. Though the word 'absolute' appears in the documentation of these loan agreement cum assignments, there are also other clauses to show that the rights and interest in the sale and purchase agreements so assigned have not been transferred to the assignors. This is explicitly revealed by Clement Skinner JC (as he then was) in *Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd*. Though the clauses referred by Skinner JC in his judgment may not be exactly the same in wordings and in numerical order as those in the various loan agreement cum assignments in our present case but they are present and practically alike. The following is his exposition of which I adopt in full for the consideration in this case (at pp 227–228).

> Clause 19 in particular permits or recognizes that the appellants (plaintiffs in our case) may execute or create a further or subsequent assignment, charge, mortgage or encumbrance over the said property or any part thereof, and to do so would not constitute an event of default; the only sanction such an event invites is that the bank is entitled to open a separate account and any money repaid by the appellants is paid into such new account and will not be treated as a repayment of the loan. In my view, a clause such as the above which allows the appellants to exercise rights over the said property as if he is still the owner thereof, must surely by strong indication mean that the parties did not intend the assignment to be absolute. In addition to the above, cll 15, 26 and 33 all recognized the appellants are entitled to have possession of and enjoy the said property except that the appellants are obliged to insure, maintain and upkeep the same. If the assignment was intended to be absolute so as to transfer all rights, title and interest in the said property, as contented for by the respondent, then the appellants' occupation and use of the said property would only be possible with the permission and licence of the respondent. Yet, there are no words in the loan cum assignment that indicates that the position of the appellants are that of a licensee.

With this, and the reason as expressed earlier, my answer to the question posed earlier is in the negative. This paves the way for these plaintiffs to pursue with their claims.

Besides the finding above, I am also of the view that by the principle of equity of redemption these plaintiffs are also able to maintain their right to sue. Though the defendants concerned have submitted to me that this equitable principle has no place in our system of land registration since 1917, as expressed in *Hj Abdul Rahman v Mohamed Hassan* [1917] 1 FMSLR 290 and approved by the FMS Court of Appeal in *Wong See Leng v C Saraswathy Ammal* [1954] MLJ 141 at p 143 which says:

> It seems to their Lordships that the learned judges have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were dealing with a totally different land law, namely a system of registration of title contained in a codifying enactment. The very phase 'equity of redemption ' is quite inapplicable in the circumstances.

I find that this attitude have changed by the decision of the Federal Court in *Chuah Eng Khong v Malayan Banking Bhd*. There, Peh Swee Chin FCJ has categorically revived this principle with these:

> If it is an equitable mortgage, like a legal mortgage, the borrower has obtained a second right to redeem after the contractual date for redemption has expired, ie he has got equity of redemption for, in the eyes of equity, the lender

> is not the owner of the said land notwithstanding the said assignment, but the borrower is, but subject to mortgage, and the lender a mere 'encumbrancer'. The equity of redemption arises as soon as any document, on a true construction, is found to be a mortgage. The use of the word 'mortgage' may sound like sacrilege in view of the presence of the Code which does not use the word, especially to a legal man who specializes in 'common law' but not to one who is familiar with 'chancery practice'; for the latter, despite the assignment, the borrower is still the owner of the land subject to the mortgage.

The learned judge then proceeds to determine as follows (at p 111):

> Although there is a well-known distinction between a mortgage where a borrower's land is usually transferred or assigned subject to the equity of redemption and a charge where such land is not transferred or assigned at all but it gives the chargee rights over the land, a charge of land has always been regarded as a species of mortgage for most practical purposes; see *Law of Real Property* by Sir Robert Megarry (former Vice Chancellor of Supreme Court of the United Kingdom) and HSR Wade (5th Ed) at p 914.
>
> The Court of Appeal used the words 'equitable mortgage' in relation to security transaction without restraint and totally without any inhibition in the face of the National Land Code. We support such usage.
>
> Here, the said loan agreement, on a true construction, is an equitable mortgage but not an equitable charge, as there was no deposit of document of title … .

Since the loan agreement cum assignment is an equitable mortgage the principle of the equity of redemption is back in force in this country; with it comes the right of these plaintiffs to proceed with their claims.

The cause of collapse of Block 1

In order to determine the liabilities of defendants on the allegations as charged by the plaintiffs, it is necessary at the onset to establish the cause of the collapse of Block 1 which lead to the forced evacuation Block 2 and 3. To decide on this, it is essential to disclose some brief facts.

Highland Towers & Its Surrounding Features

THE RETAINING WALLS

The three apartment blocks of Highland Towers were built on elevated land with a relatively flat base. Directly behind it was a steep hill. Though some witnesses have describe the gradient of this hill to be ten to 20 degrees but, by my estimate from various photographs tendered as exhibits, I perceive it to be far steeper. This hill was terraced, supported by retaining rubble walls made of boulders and cobbles of rock of varying seize placed together by mortar at a random fashion. Some of these walls had collapsed and were buried in the soil at the time of the Highland Towers tragedy. Those left are still standing, either in part or as a whole, but in a dire state of repair. From a physical survey commissioned by MPAJ soon after the collapse of Block 1 on the affected area, covering the Highland Towers Site and the Arab Malaysian land, it is apparent that these retaining walls were constructed in

A a haphazardous manner. Some were located on the Highland Towers Site with the rest in the Arab Malaysian land.

OWNERSHIP OF THE SLOPE BEHIND HIGHLAND TOWERS

Both the Highland Towers Site and the Arab Malaysian land once belonged B to a common owner — the first defendant, who intended to develop the entire area into a housing scheme with three apartment blocks on Highland Towers Site and bungalows on the Arab Malaysian land. When the lands were subdivided and issued with individual documents of title, the first defendant mortgaged the bungalow lots, consisting of 50 in number, to the C fifth defendant in consideration of some financial arrangements. When the loans were not repaid, the 50 bungalow lots were transferred to the fifth defendant in November 1991 to offset the amount due.

THE EAST STREAM & PIPE CULVERT

D At the furthest eastern corner of the Arab Malaysian land water from a stream, popularly known as the 'East Stream' (which name is totally inappropriate since it actually flows westward), enters the fifth defendant land. The source of this stream originates from the Metrolux land. It flows down hill in a westerly direction until it reaches a plateau where it forms a mud pond. From here the water is channeled into a set of concrete culverts E which directs it to a pipe culvert (pipe culvert). This pipe culvert runs horizontally right across the hill slope of the Arab Malaysian land. After passing through ten bungalow lots, the water from this pipe is discharged into Lot 445 which is situated in the north. Lot 445 is a government land. This entire of the land, as described, seems unaffected by the effects of the landslide that brought down Block 1. F

The initial section of this pipe culvert was built as an integrated part of a retaining wall. It has manholes located at various intervals. Just by the side of this pipe culvert, running for some distance, is an open concrete drain. This was intended to drain surface run-off water while the pipe culvert catered for the water emanating from the East Stream.

G All drainage and geo-technical experts who testified in this case agree that the flow regime of the East Stream into the pipe culvert running across the hill is highly undesirable and dangerous. Instead of water flowing along its natural course — downhill (following its natural terrain), it is now diverted into a man made structure that requires constant maintenance and H supervision. Failure to attend to this will affect slope stability, causing a danger to humans living down slope. It must have been this concern that, subsequent to the collapse of Block 1, the rescue operators, upon discovering this unwarranted drainage system of the East Stream, redirected the flow pattern of this stream to its natural course, downhill in a westerly direction. They did it by placing sandbags in an area to prevent I the flow of water into the pipe culvert. This is not completely successful since, by my observation during this court's visit to the area, water is still detected in the pipe culvert.

Further down slope on the Arab Malaysian land is network of drains. A Those at the upper sector are earth drains while at the lower portion are made of concrete. These drains, I believed cater for surface water run-off while the pipe culvert was to take care of the discharge emanating from the East Stream. Though in certain areas these drains are disconnected abruptly, presumably caused by the landslide that brought down Block 1, those at the upper level are still intact. But they are in an odd fashion. B Starting from the top, a drain runs parallel for some distance along the pipe culvert. It then suddenly makes a U-turn to flow back in the same direction from where it came from. Then after proceeding for some distance, it is connected to a culvert across a road reserve. At this culvert and joining it is a drain coming from the opposite direction. By deduction, this drain from C the opposite caters for water run-off on the southern side of the slope. From the junction the drain proceeds down hill and terminates abruptly at far right at a level parallel to the rear of Highland Towers. From an overall view of the post-collapse survey plan, this drain must have continued along the rear of Highland Towers until the end of Block 3 when it turned left down hill and drained into the lower section of the government land — Lot 445. D

This drainage pattern too, in the view of all experts in the field of hydrology, is far from satisfactory. Firstly, large section of drains is earth drains that can be easily eroded. Secondly, water can infiltrate into the soil of these earth drains at a greater rate than those made of concrete. Thirdly, the flow pattern of these drains is undesirable. It does not flow naturally E down hill. Instead it makes a number of U-turns, one of which even flows backwards to the direction where it came from. Fourthly, the drains are insufficient to accommodate the amount of run-off from the slope. Fifthly, the drains are in a vegetated area and maintenance is regularly and constantly required.

F

Before the Arab Malaysian land was sold to the fifth defendant, one Mr Lim (DW1), an employee of the first defendant was in charged of the drains on the slope. He ensured water in the drains flowed without interruptions, particularly free from vegetation interference around it, and when the drains were damaged he would repair them. Failure or neglect to ensure these had serious consequences as can witnessed by the flooding in the car parks of G Highland Towers accompanied by rocks and mud, as well as a landslide on the slope some months before the collapse of Block 1. This was when Tropic moved into the Arab Malaysian land to excavate and cleared the vegetation as well as leaving branches of trees and debris in the drains.

Bruce Mitchell's photographs

H

The three blocks of Highland Towers were built in such a manner that Block 1 & 3 were almost parallel to each other, with Block 2 in between set slightly back. From the window of the 4th floor of Block 3, a resident, Mr Bruce Mitchell, had the presence of mind to snap a series of photographs just before the collapsed of Block 1. These highly commendable pictures, I six in number, recorded the tragedy and rendered us a grime reminder of the last moments before the disaster that took so many lives and caused

A enormous loss of property. These pictures also provided invaluable information to specialist in the field of geo-technology to determine the cause of the collapse. They are marked as exh P7A–7H but are commonly, throughout this trial, referred to as the 'Mitchell Pictures'.

As principal expert witnesses have relied extensively on these pictures B to form their opinion, it is essential that I give a brief description of each of these.

Photograph P7A, shows a view of the rear section of Highland Towers framed on both sides by the balconies of apartments in Block 1 and 2. At the furthest end of the picture is the hill slope. Erosion scars are seen in two areas engulfed by vegetation, mainly trees which lean downhill as if being C pushed by some force from above. Beneath is a rubble retaining wall. In front of this wall is a heap of earth with fragments of tar spawn over. Lower down from this spot is a continuous row of corrugated asbestos roofs in a state of collapse, with motor vehicles trapped under. Right next to this and slightly further front, is a cement slap which looks like an open-air D badminton court. Supporting it is a rubble retaining wall topped by flower plants.

The left side of picture P7B shows a partial profile of Block 1 with some balconies of apartments facing Kuala Lumpur City protruding out. Beneath these is a tar-paved road with 3 motor cars parked in a row. At the far end of this road is a rubble retaining wall supporting a growth of lush green E vegetation. The lower portion of this retaining wall has explored with soil spawn over a lower tier road. A lamppost standing close to the area where the soil is seen emitting has leaned.

Photograph P7C is the second frame of the same spot as P7B. The soil seen emitting in the earlier picture it is more profound. Substantial part of F the retaining wall has collapsed. Greater volume of earth is seen gushing out of the disintegrated retaining wall. The lamppost has leaned more extreme.

P7D captures almost the entire Block 1 tilted at an angle with clouds of dust emitting from the base.

P7E records Bock 1 almost tumbling to the ground. The rear G apartments' balconies, now facing the sky are clearly visible.

P7F is a second frame of the same spot as P7E. In this subsequent shot, taken a few seconds later, there is a sea of dust with intermittent sight of a fallen building.

P7G reveals a wider view of the rear of Block 1 without the building H (Block 1) obstructing. The dust from the fallen Block 1 is still present as evidenced by the white cloudily shades on the right side of the picture. In the center, starting from the top is the hill slope marked by scars extending to the right in a continuous line. Below, divided by a row of vegetation, is a rubble retaining wall that is still standing but split in the middle and slanting. In front of this is a large mess of expose earth, and floating on top I are some cars with parts of the corrugated roof, which once provided a shade for the car park. At the extreme left of this photograph stands Block 2, with its landscaped terraced garden fully intact.

P7H is a pathetic view of the collapsed Block 1 lying on the ground in one piece with stunned spectators staring at the aftermath in total disbelief.

Investigation & MPAJ Report

GENERAL

Immediately after the collapse of Block 1 rescue operation was mounted. MPAJ who had administrative responsibility over the area assumed a leading role. It set up a Commission of Inquiry ('Commission of Inquiry') headed by its President. This Commission consisted of representatives from various government departments and professional bodies (like the Boards of architects and engineers) relevant to the scope of the enquiry. The term of reference of this Commission was to: determine the cause of the collapse, identify the person or persons responsible, with recommendations on actions that could be taken against him or them; make recommendations on measures to prevent reoccurrence of such an accident; and to make assessment and recommendations on the fate of Block 2 and 3.

The Commission divided its work into various committees which in turn spread out its task to a number of sub-committees. At the end of three months from date of inception, this Commission published a report. It is in five volumes. For ease of reference, I refer to it as the 'MPAJ report'. When the plaintiffs' counsel attempted to tender this document in court to be marked as an exhibit some defendants raised objections. This is understandable. The Commission of Inquiry, after identifying the cause of collapse, also attributed faults to certain defendants. Such findings, according to the affected defendants, is unfair since they were not represented at the inquiry nor given an opportunity to test the validity of the evidence adduced. It is pertinent to note that included in this report are numerous data plans, maps and information gathered by the investigating section of the committee immediately after the collapse. These are useful and offer enormous assistance to any expert in determining the cause of the collapse of Block 1. In fact all the experts called to testify before me had, in one form or other, relied on some of the plans, maps, and information and data contained in the MPAJ report to formulate their expert opinion.

The admissibility of the MPAJ report

To determine this issue on the admissibility of this MPAJ report I called for submission from both sides. After hearing arguments, I ruled that this report is admissible and ordered it to be marked as p 47 to p 52.

To justify this the following are my reasons. It is set in the format of question and answer.

1 Question: Is the MPAJ report a public document as defined under s 74 of the Evidence Act 1950?

Answer: Yes, it is for reason that it falls within the definition of s 74(a)(ii) of the Evidence Act which states:

A

> The following documents are public documents:
>
> (a) documents forming the acts or records of the acts of —
>
> (ii) official bodies and tribunals.

2 Question: Is MPAJ an official body within the term — 'public bodies' as set out in the specific section of the 1950 Act referred above?

B

Answer: Yes, it is for reason that in s 78(1)(e) of the Evidence Act, which relates to the tendering of such public document, local authority is specifically mentioned in following manner:

> The following public documents may be proved as follows:
>
> C (e) the proceedings of a municipal body, town board or other *local authority* in Malaysia —
>
> by a copy of the proceedings certified by the lawful keeper thereof, or by a printed book purported to be published by the authority of that body; ... (Emphasis added.)

D

3 Question: Is the MPAJ report a proceeding of the local authority?

Answer: Yes it is for reason that MPAJ, being a local authority, under s 28 of the Local Government Act 1976:

> E May from time to time appoint committees, either of a general or special nature, consisting of the chairman and such number of the Councilors and such other persons as the local authority may think fit, for the purpose of examining and reporting upon any matter or performing any act which in the opinion of the local authority would be more conveniently performed by means of a Committee, and may delegate to any Committee such powers, other than the power to raise money by rates or loans, as it may think fit, and may fix the quorum of any such committee,

F and the act of such committee in producing such a report must be considered as a proceedings of MPAJ.

4 Question: Has the plaintiffs proved this document for the purpose of admission as evidence in this proceeding?

Answer: Yes. The MPAJ report is in a printed book published by the authority of that body.

G

5 Question: What is the probative value to be attached to the contents of this MPAJ report?

Answer: By the Indian authority of *Tara Kumar Ghose v Kumar Arun Chandra Singh* AIR 1923 Cal 161; 74 IC 383, the High Court of Calcutta expressed that:

H

> ... it must be recognized that the question whether a document is admissible in evidence as a public document is fundamentally distinct from the question whether its contents are binding upon the tenants without proof of notice on them or of their consent.

I Though this Indian case involves the proving or disproving the existence of tenancies to receive protection under some rent control enactment in India, the principle expressed therein is sound and logical. I am persuaded to adopt it for application to the circumstances of our case.

With this, I am of the view that though the MPAJ report is admitted as evidence, the findings made therein, as well as opinions expressed have still to be evaluated. And unless these are tested by the due process of the procedural law ie by examination of witness or witnesses who personally form such opinions or made such findings, then very little weight shall be attached when this court is asked to evaluate them. A

B

Except for Dr Nik Ramlan, who was a member of the Commission of Inquiry and the head of the technical committee but was not personally involved in formulating the opinions and findings, and the MPAJ architect, who acted as the secretary for the Commission, no other members from this body or its various sub-committees were called to testify. This leaves the conclusions, findings, interpretations and opinions expressed in this MPAJ report quite valueless except for the data, plans, maps and information, which most parties made use of. Since these were accepted without objections, I shall consider them on the basis as documents agreed upon by all parties concern. C

D

The theories of slope failure

With sufficient disclosure above, I shall now proceed to analyze the cause of the failure of Block 1. There are basically two conflicting theories advanced: one from the plaintiffs and the other from the fifth defendant. Experts in the field of geo-technology were called to substantiate these. Supporting the plaintiffs' contention is Dr Weeks (PW9), and on the side of the fifth defendant, is Prof Simons (DW11). The significance of these two theories is the belief that it will affect the liabilities of the parties, particularly of the first and fifth defendant. If Dr Week's version is accepted, then it is contented that the cause of failure emanated from the fifth defendant's land. Prof Simon, on the other hand, insists that it originated from the first defendant's property. Though both are defendants, but only one is of substance. This is the fifth defendant, which is a financial institution as compared to the first defendant, a company that was wound up when submission was coming to an end. Thus, both the plaintiffs and the fifth defendant spent enormous energy in attempting to convince me to their side of their belief. E F

G

Dr Week's theory

Dr Weeks commences his testimony with an explanation of the factors associated with slope stability when soil in the area consists of mainly sand or sandy materials. He says that the three factors governing slope stability are: firstly, the slope angle or the angle of the slope; secondly, the shear strength; and thirdly, the pore water pressure. In respect of shear strength, he explains that this is the strength of the soil material before it slips. It is technically described as the relationship between force weight and friction. In short, if you know the weight of the soil you would know the force needed to cause a slip of that soil. Pore water pressure is when water infiltrates into the sand, it fills up the pores of the sand particles. Due to the height of the sand on top of each other, pressure is asserted This, in turn causes the grain H I

A of sand to loose contact with each other and lifts itself — resulting in weight reduction. When the weight is reduced the sand slips easily. Thus, any increase in pore water pressure will result in a reduction to the resistance in sliding. Much associated with these factors, is the reaction of sand caused by suction. Dr Weeks illustrates this with the experience of a mold created by an upended bucket of beach sand. It is unstable when dry; when damp B it will stay; yet with too much water it will slide or topple over.

With the aforesaid preliminaries, Dr Weeks proceeds to declare that it was a series of landslides that brought down Block 1 and these were primarily caused by — water. According to him, it was a failure of a retaining wall on the upper slope of the fifth defendant's land which C initiated a rotational landslide. This in turn triggered off a mantle slide just below due to the upper layer of the soil in this sector heavily saturated with water. When the mantle slide came down in one piece it took whatever was beneath it — the retaining walls, trees, vegetation, car parks, badminton courts and Block 1. Because of the speed of this mantle slide and the nature of the soil, being loose or very loose, and the presence of large amount of D water in the soil, he classifies this mantle slide into a special category — called a flowslide.

At this stage there is a necessity to explain the types of landslide described. A rotational slide: is landslide where a failed landmass comes down in a rotational manner ie the toe of the slip is forced out and reverts E backwards in a curve. A mantle slide: is when a failure involves only the upper layer of the soil. As for a flowslide, it is a mantle slide but has the characteristic of speed, material being loose or very loose, and the depth of failure is relatively shallow depth with presence of substantial amount of water.

F To support his theory Dr Weeks relied, firstly, on Dames & Moore's borehole test. Dames & Moore is a firm of geo-technical engineers engaged by the fifth defendant to conduct geological test on the Highland Towers Site and the Arab Malaysian land after the collapse of Block 1. At locations where they did the test, results show loose or very loose sandy soil. Such type of soil, in the opinion of Dr Weeks, has large pore space and of low G density. It moves close to each other when saturated with water, causing the pore water pressure to increase. When this happens there will be a reduction to the resistance in the shear strength of the soil — causing it to slide.

Secondly, Dr Weeks relied on the Mitchell's pictures. At photo P7A, on the top left-hand corner of the building, he points out a scar with mark H edges. This scar is more distinct in photo P7G. This, he claims, is where the mantle slide originated. Slightly lower, just above the third balcony of Block 1, counting from the top as shown in the same photo, Dr Weeks highlights another scar. This he says, is evidence of the landslide which originated above had moved downhill. Next, he points to the signs of heaping and buckling of the ground in front of the rubble wall at the second I tier car park (again revealed in the same photo). With no earth from the rear overriding or falling from above onto the car park but instead of lifting it up, Dr Weeks feels that the landslide was proceeding beneath the ground. He fortifies this view with the revelation of some cars have shifted to the front and cracks appearing in the retaining wall that supported the badminton courts as disclosed in photo P7A. Further, he claims that when photos P7B and C were shot five seconds later, the retaining wall at the side of Block 1 had busted. This, to Dr Weeks, implies that the soil material was moving very fast and by his calculation — at the speed of 1 ½ meter per second. This is based on the fact that the subsequent shot by Bruce Mitchell in photo P7C, taken of the same area a few seconds later, shows that the lamppost next to the retaining wall had leaned more extreme and the wall itself was disintegrating, with soil exploding across the road. Also found in this picture are cracks appearing on the tar pavement in front of Block 1. Dr Weeks insists that these are not only indications of the speed of the soil movement but the momentum it generated to force the entire Block 1 to move, as shown in photo P7G.

To further support his theory, Dr Weeks refers to the oral testimony of Bruce Mitchell. This witness has said that he noticed movement on the hill slope before he took the photos. He describes it as ' like something rippling beneath'. Dr Weeks interprets this as representing a relatively shallow landslide of the upper mantle layer taking with it trees, vegetation and retaining walls on top.

Finally, for evidence of saturation of water on the slope, Dr Weeks relies on his own observation during his three visits to the Arab Malaysian land where he noticed water flowing in an uncontrolled manner over the surface of the slope. This he said, is confirmed by various photographs tendered as exhibits showing water over flowing a retaining wall and the existence of 'ponding' (pools of water) on the ground.

As for the failure of the retaining wall at the upper slope of the fifth defendant's land which initiated the rotational slide, Dr Weeks alludes that this was due to a low factor of safety of this wall and the uncontrolled water coming down the surface of the slope to cause movement on the loose or very loose soil material at the spot. By Dr Week's assessment, the factor of safety for this retaining wall was only 1.02. This is far below the accepted geo-technical engineering standard to determine slope stability which rules that a slope will fail if it has a factor of safety of 1 or less than 1. Factor of safety in simple term means the reserve you have before failure of a slope.

During the course of trial, Dr Weeks advances an alternative theory — that the landslide was caused by the existence of 'a perched water table'. He says that he formulated this after his recent revisit to the site where he discovered new landslide in the area. This caused him to 'revisit' the Dames & Moore data where it shows the presence of clay in the soil at the Highland Towers Site and Arab Malaysian land. He explains that clay being a relatively impermeable substance does not allow water to infiltrate the soil easily to reach the ultimate ground water table. When there are lens of clay present in the sub-soil a perched water table can be formed above. Such perch water table has enormous effect on the pore water pressure of the loose or very loose soil at the mantle of the slope causing it to be less resistance to slide.

To support his new alternative theory, Dr Weeks relies on: (a) the finding of clay or clayey materials at the sub-level of the slope as indicated by the soil test from Dames & Moore borehole test; (b) the relatively high water level recorded by Dames & Moore when the borehole test was carried out.

As there is a challenge by the fifth defendant on this perception of a perch water table there is a necessity to explain the technique used to obtain the data mentioned above. To conduct a bore hole test an instrument called a standpipe is inserted into a hole drilled to the ground till it reaches the granite. The purpose is to obtain subterranean soil sample and to ascertain where the ground water table is. For the latter, the theory works in this manner. As granite is relatively impermeable water will remain just above it. This level is considered as the ground water table. Readings are taken periodically from this standpipe and with a series of standpipes placed vertically in a row down slope one can chart a graph to determine the gradient of its flow. The necessity to ascertain this is because the level where this table is will effect the pore water pressure on the soil material around it. Also, the pressure of this water table creates pressure against any retaining wall around it.

Professor Simons' theory

Professor Simons' theory is less complicated once the characteristic of the soil material and its relationship to slope failure has been explained. According to Prof Simons, the collapse of Block 1 was due to the initial failure of the high rubble retaining wall of ten to 11 meters immediately behind the second tier car park. This wall he refers to as the 'High Wall' failed and initiated a series of retrogressive landslides up the slope behind this wall. Simultaneously a forward movement down slope was effected. This forward movement down hill created such a surcharge load that Block 1, with its pile foundation not designed to accommodate any horizontal load, collapsed, bringing along with it the structure it was supporting.

Professor Simons explains a 'retrogressive slide' as a rotational slide which begins at the bottom of the slope and regresses upward in a series of rotational slide. Here, each rotational slide is a segment of a limited failure and it happens next behind the other due to loss of toe support. It continues progressively up slope, getting less active as it proceeds.

To support his contention, Prof Simons offers the following: First, the aerial photograph (p 30 of exh P48) taken by the Investigation Committee of the Commission of Inquiry a few days after the collapse of Block 1. This photo shows a number of scars on the land behind the collapsed building. 'A scar' is interpreted here to mean 'a step in the slope with bare earth'. It is the exposed surface of the earth after the ground had slipped due to weakness and loss of support. According to Prof Simons' interpretation of this photo, there are four scars. This, in accordance to authoritative geo-technical engineering text represents a rotational retrogressive failure beginning from the head scar at the lowest point. The

High Wall, he insists, was located here. Against this is Dr Week's A
interpretation of this photograph. He says there are only two scars. By this, he claims, is in line with his theory of a rotational slide followed by a flow slide.

Secondly, by the calculation done by Prof Simons this High Wall had a very low factor of safety. In his opinion, this High Wall would fail at the B
height of five meters without any water pressure acting at the back of this wall. In fact, his analysis shows all those walls behind Block 1 had only a factor of safety of 1.52 even on the assumption of no water pressure was applied against them. This factor of water acting at the back of the wall has relevance because water at the back of the wall will increase the thrust on the wall and makes it more vulnerable to collapse. Thus, in his opinion this C
High Wall with such a low factor of safety would have easily failed on its own without any water influence.

Further, according to the words of Prof Simons, 'This High Wall consist of blocks of stone of varying seizes hand plastered in mortar at a random fashion with no drainage blanket behind it. It does not appear to sit D
on any foundation. It just rests directly on the ground ... . It is simply not big and heavy enough to carry earth pressure acting on it, let alone additional water pressure.' Such wall, in his opinion, was very vulnerable to failure.

Before I proceed further I must express this court's appreciation to the E
efforts of Dr Weeks and Prof Simons in analyzing the cause of failure of Block 1. Though this court may believe one against the other, or even only accepting part of either theories, but no aspersion is cast on the integrity, competency and professionalism of both these two men. They are, in the mind of this court, gentlemen of integrity and great learning in their chosen discipline. From their C.V. presented, they rank among the top F
personalities in the field of geo-technological engineering in this world. This court has indeed benefited from their expertise.

My analysis of these two theories

With the views of both these experts forcefully put, I shall now proceed to G
analyze the two theories advanced and attempt to come to a conclusion as to which of the two is more probable.

I shall begin with the aerial photo. This photo, taken just two days after the collapse of Block 1 by the Investigation Committee of Commission of Inquiry is already interpreted by the various dotted lines drawn across the H
scars. It shows three scars. According to Dr Nik Ramlan, the person responsible for this interpretation was a member of the Investigation Committee and he was qualified to undertake such task. But since this 'interpreter' was not called to testify then such interpretation must be ignored, leaving for consideration the different versions put forth by the two experts base on the images captured in the photo. This photograph proper I
is not disputed by the parties; what they are only unhappy about is the interpretation by whoever who drew the lines on it.

A After due consideration I am more incline to adopt Prof Simons' interpretation. But instead of his conclusion of four scars, I only can detect three. I base this on the number of exposed naked surfaces interspersed by the lines of vegetation which must obviously include the area above the top most scar.

B The next matter I shall consider is the soil condition of the failed mess after the collapsed of Block 1. According to Dr Weeks, in a mantle flowslide the soil must be very saturated with loose or very loose material spreading over a wide area. With such a characteristic one must expect the area around the collapsed apartment to be wet and muddy. But, from evidence adduced through various witnesses it is the contrary. Even Bruce Mitchell C who initially described the soil exploding from the side of the retaining wall of Block 1 to water spurting out from a fire hydrant was forced to admit that such material looks dry after reviewing his own photos P7B and C.

Proceeding therefrom, I find Dr Week's reliance on Mitchell's photo P7A to show the beginning of the mantle flow slide has many flaws. Firstly, D Bruce Mitchell's line of vision from his window in Block 3 was restricted. What he saw, as reflected in this photo, was a landslide that had already begun with the High Wall having failed. By 'failed', I must adopt Prof Simons' interpretation to mean, 'the ground (beneath it) has failed' even though 'the foundation or structure of the wall may not fail'. This explains the reason why this wall remained upright in photos P7A and G as well as E that in p 36 of P49. These pictures show this wall in a slanting position but not disintegrated. But effectively, this wall had failed since it was no longer capable of fulfilling its purpose of retaining soil behind it. Bruce Mitchell in fact did not see this wall failing, in the sense as described above, when he shot photo P7A. His line of vision did not extend to the area where this wall was originally located. His vision was blocked by Block 2. What he actually F saw of the High Wall through photo P7A was after this wall had moved 16 meters down slope after failing. The heap of earth material in front of this High Wall must be the effect of a rotational slide where the surcharge had lifted the earth in front of the failed mass and exposed it at its toe. Dr Weeks had attempted to explain the reason why this area heaved since it G is contrary to the characteristic of a mantle flow slide (which would have brought this part of ground in one piece down slope). He said that this location being dry, due to the tar surface of the car park, prevented water from infiltrating into the soil. So when there was a surcharge caused by the mantle flowslide this area just buckled up. I find this unconvincing. To my mind a mantle flowslide progressing down hill at a speed would have H generated so much momentum that this relatively narrow area would not be able to withstand any surcharge to even heave. It would have been just swept down slope in one piece with everything on it. This heaped up ground material was caused more probably by the effect of a rotational slide.

As for the scars described by Dr Weeks at the rear of this High Wall in Mitchell's photo P7A, I am more incline to think that they were actually the I effects of a retrogressive slide that happened after the High Wall had failed. It could not be an indication of the beginning of a mantle flowslide that progressed downwards from here. By the time this picture was taken, the

High Wall had moved a substantial distance and when seen together with the scars spotted by Dr Weeks, then it could not be an indication of the beginning of a mantle slide.

I shall now proceed to comment on the alternative theory of Dr Weeks — the existence of a perched water table. When Mr Han (DW 10), who supervised the borehole test for Dames & Moore, exposed that water, as a drilling fluid, was used for all the borehole test this theory of the Dr Weeks losses creditability. By Dr Week's own admission, when water was used instead of foam then the reading of the standpipes inserted soon after the boreholes were made would not represent the true water level for the purpose of determining a perch water table of the ground. The reason is this: Water introduced into the ground takes a substantial period to infiltrate into the ground to reach ground water table. So when water level readings are taken soon after water is introduced into the standpipes high water level will be recorded. This may give a false indication of a perched water table existing above the ground water table.

For a perched water table to prevail it is insufficient to just have clay or clayey material present; there must be lenses of these and they must be fairly proximate to each other to prevent water from infiltrating into the soil below. Though clayey materials are found in the Highland Towers Site and Arab Malaysian land there is no evidence to fortify that they are extensive enough to indicate presence of lenses of clay of close proximity to form a perched water table. Against these facts, Dr Weeks criticizes the methodology carried by Dames & Moore in its investigation. He is of the view that Dames & Moore should have used a piezometer (an instrument to detect pore water pressure beneath ground) to locate the slip surface and in the course of this could have detected a perched water table. I feel that this criticism is somewhat unwarranted. If the plaintiffs wish to influence this court on the presence of a perched water table then they must prove it. It is not for the fifth defendant to carry out such task for the plaintiffs. As far as the methodology is concerned, like in any form of investigation, there is more than one approach. In this instance case I do not find the investigators of the fifth defendant had carried out their probe in a manner unacceptable in their professional field.

This court's finding

With the aforesaid reasoning I find that the landslide that brought down Block 1 of Highland Towers was a rotational retrogressive slide emanating from the High Wall behind the second tier car park.

Though this wall was the first to fail but what caused it to fail? Professor Simons attributes it to poor design and construction and reiterated that this wall, with a very low factor of safety, would have failed even without any water pressure acting against it. But this High Wall stood for ten years without failing. Why did it not fail earlier if it was so weak and fragile?

Professor Simons causally offers this excuse: that at 'certain location the soil strength is stronger than what we have assessed'. But I note that he did not dismiss water as one of the factors that caused this High Wall to fail, A though he down played it by insisting that it only played a 'comparatively small role'.

But I find this not convincing against all theories and principles advanced to explain slope failure. Firstly, failure of a wall as defined by Prof Simons means 'the ground (beneath it) has failed' even though 'the B foundation or structure of the wall may not fail'. In this case it must be the former since this High Wall is still visible in the Mitchell pictures. With this, we must examine the soil condition beneath this wall. We have evidence that the suspected area of failure consisted of sandy soil. Such soil material is very permeable and water will percolate into it very fast. With ten days of continuous rainfall in the area before the failure of this wall surely the C ground on which it stood would be saturated with water when the drainage system of the slope was either insufficient or inadequate to accommodate water. When this happened the pore water pressure in the soil increased to cause the soil to be less resistance to slide. This must have played a very major role in causing the ground on which this High Wall stood to fail. Besides, it is also established that when soil is saturated behind any retaining D wall it will create a thrust against the wall. This must have been the effect on this High Wall. Thus I find that water must have been a major factor in causing the collapse of the High Wall and the landslide that followed. In fact Professor Simons, in his expert report (P38) has repeatedly emphasized water as a factor which caused the collapse of Block 1. But as to why he E reduced its significance and importance is not explained, leaving room for speculation.

Where did the water come from?

But where did the water come from? From evidence adduced, it came from F two sources. The first was rainfall. Though rainfall in the area for the same measured period of time did not exceed the amount which fell the previous years it rained continuously for ten days preceding the day of the collapse of Block 1. This rainfall that fell, part of it was absorbed into the ground and percolated into the soil. The other would be run-offs and washed along the surface. With the internal drains on the Arab Malaysian land, the water G would be directed down the slope in a controlled manner. But these drains on the Arab Malaysian land were neither sufficient nor efficient or maintained to carry the load, as described by the drainage experts — Mr Hooi (PW3) and Mr Douglas Yee (DW12). Substantial part was earth drains and this permitted easy percolation of water into the soil to saturate it. Some were blocked or with vegetation growing over them, as witnessed H by the photographs taken soon after the collapse of Block 1. Such blockage must have caused severe overflow on the terraced slope as disclosed by Mr Lim (DW1), the maintenance man of the Highland Towers from the experience of the Tropic's clearance of the hill slope without removing and clearing the debris from the hill slope drains.

I The second source was water from the East Stream. As described earlier, water from this stream was directed into the pipe culvert. A witness, Mr Mike Rickard (PW4) who tracked up the slope of the Arab Malaysian land soon after the collapse of Block 1 found this pipe culvert in very poor condition, damaged in many parts with water leaking therefrom. He captured these images on photographs exhibited in encl 98. Subsequently, when Mr Hooi and Mr Douglas Yee visited the same site to carry out investigations they too confirm what Mr Mike Rrickard described. A

Not only was water not flowing smoothly along the pipe culvert, the area before the water of the East Stream entered this channel was also heavily silted. Mr Lim (DW1), testifies that when he went up to this spot just after the Highland Towers tragedy he found the mud pond and the inlet into the pipe culvert completely covered with silt. Due to this, water from the East Stream over flowed onto the slope. This view is reiterated by Mr Rrikard with his photographs. B C

Liability of each defendant

I shall now begin to examine the accusations by the plaintiffs on each of the defendants and determine whether they are liable.

D

The first defendant

Beginning with the first defendant, who was the developer of the Highland Towers, the plaintiffs accuse it of the following: Firstly, for not employing reasonably fit, competent, skilled and qualified persons to design, draw, sign and submit architectural and engineering drawings and plans for the construction of Highland Towers and the hill slope behind it. Secondly, failing to ensure that the three apartment blocks of Highland Towers and the drainage system and rubble retaining walls around it were constructed in a workmanlike and safe manner by giving consideration to the surrounding terrain, soil condition and drainage requirement. Thirdly, of obtaining certificate of fitness ('CF') to occupy the three apartment blocks when the drainage system in the Highland Towers Site and Arab Malaysian land were incomplete. E F

The first accusation levied against the first defendant is much connected and associated with the liability of the second and third defendants. For the second and third allegations, these too require examination of the works and deeds of the second, and third defendants. For this reason I shall defer my analysis on the liability of this defendant until my finding is made at least against the second and third defendants. G

H

The second defendant

In 1974, the first defendant engaged the second defendant, an architectural draftsman, to draw and submit layout plans for the development of Highland Towers and the bungalows lots on the Arab Malaysian land. For this development, I shall hereinafter refer to it as the 'Highland Towers Project'. According to the second defendant, an executive director of the first defendant, one Mr Yap, was aware that he was not a fully qualified and registered architect. When the layout plan for the Highland Towers Project I

A was approved, the second defendant proceeded to prepare and submit building plans for the three apartment blocks of Highland Towers.

The following chronology of events will give an insight of what transpired in the course of building Highland Towers and the development of the Arab Malaysian land including the surrounding area.

B

Chronology of events

On 9 October 1974, a layout plan submitted by the second defendant, for and on behalf of the first defendant, to the District Office of Kuala Lumpur, the predecessor of the fourth defendant, was approved. This approved C layout plan is for a proposed building of three blocks of apartments on Highland Towers Site and bungalows on the Arab Malaysian land. Accompanying this approval was a letter by this District Office to say that the approval was subjected inter alia to the following conditions:

One, because the area approved for development is steep and hilly, all excavation and leveling works must follow requirements set out by the D Public Works Department; and two the relevant technical departments must approve drainage, road and other related plans before any development can begin.

The second defendant in submitting this layout plan and subsequent building plans for the Highland Towers was only a draftsman, but had held E himself out as a registered architect. The authorities, by some error on their part in not checking the second defendant's credentials, had in fact permitted him to submit such building proposals and plans.

On 22 November 1975, the Lembaga Bandaran Gombak ('LBG'), the local authority who had taken over the administrative function of the area F from the District Office, informed the second defendant that the drainage plan submitted was not approved by the Irrigation and Drainage Department ('JPS') because no provision was made to cater for the stream in the area. It proceeded to advise the second defendant to stop construction work on the Highland Towers until the drainage for the stream is incorporated in the plan.

G *(System of operation between the local authority and the State Government departments)*

At this stage it is necessary to disclose the system of operation between the local authority, such as the LBG and its successor, the Majlis Daerah Gombak ('MDG'), with various government departments of the state of H Selangor. During the construction and completion of the three apartment blocks of Highland Towers the local authority having jurisdiction over the area was in its formative years. It lacked manpower and facilities. To assist them, the State Government of Selangor allowed the local authority to use its various technical departments to consider and evaluate all matters relating to the development projects under its jurisdiction. This included I land leveling and drainage. In such matters, the local authority acted merely as a secretariat. Upon receiving relevant development proposals and plans it would send them to the respective technical departments of the State.

JPS, being a department involved, would study the matter referred to it and after due consideration returned these to the local authority with comments and suggestions. Such comments and advice were normally accepted. These were then communicated to the developer.

On 5 January 1976, in pursuant to a proposal by the second defendant to relocate some drains, JPS issued the following advice to the local authority — LBG:

(1) though the proposal of the second defendant is acceptable but a drainage proposal plan must be submitted by the consultant; and in the meantime no physical construction work on the of Highland Towers should continue;

(2) that the land being steep, care must be taken to construct silt traps to prevent landslides or problems to the drains and stream.

On 13 February 1978, MDG who replaced LBG as the local authority of the area, requested the second defendant to construct an underpass drain to divert water from the area proposed for drainage to the Klang River which was across the main trunk road — Jalan Ulu Kelang and the cost should be borne by the first defendant. This was met with displeasure from the first and second defendants as they felt other developers in the area should also contribute to such cost.

On 19 August 1978, there was a request by the second defendant to MDG to issue a CF for Block 1. Obviously construction on the Highland Towers proceeded despite the earlier order by the PLG not to do so.

On 29 September 1978, JPS suddenly informed MDG that its objection to the second defendant's request for CF is withdrawn provided that no further construction work should proceed on the Highland Towers. One Dato Goonting (DW17), the then director of JPS, explained that this attitude was adopted because the authorities feared complaints from purchasers of Block 1 who wished to move into the completed building. Further JPS believed that the developer could still carry out the drainage plan for the area after this CF was issued.

On 8 October 1978, JPS wrote to MDG to advise that no construction on the other blocks of Highland Towers should proceed since the land to be acquired by the first defendant for the drainage was not implemented,

On 6 April 1979, the second defendant submitted drainage plans to MDG. These were rejected on grounds that they lack computation and detail and not of engineering quality.

On 17 April 1981, MDG in response to the first defendant request for issuance of CF for Block 2 required drainage plan to be approved by JPS before consideration.

On 18 April 1979, JPS wrote to MDG stating that there were complaints from residents in the vicinity of Highland Towers of flooding. MDG was to instruct the first defendant to stop earth works and to build silt traps as well as to submit drainage plans. In consequence of this, the first defendant engaged the third defendant as consulting engineer to submit drainage plans. When the third defendant came into the scene there were proposals to acquire some land below Highland Towers to channel water in the area to Klang River. This, however, did not materialize.

On 18 September 1981, the third defendant submitted a drainage plan to JPS. This was partially approved.

On 2 October 1981, JPS withdrew its objection for the issuance of CF to Block 2 provided the following conditions were met:

(1) the first defendant was to put up a bank guarantee for RM100, 000 to ensure that any drainage proposal when approved is carried out; and

(2) that such drainage proposal, when approved, must be completed within a period of four months.

On 6 November 1981, upon the first defendant securing the bank guarantee which was placed with JPS, CF to Block 2 was issued by MDG. But no drainage proposal was forwarded to JPS nor was there any approved drainage system implemented within the period stipulated. Because of this, the bank guarantee was extended.

On 5 June 1982, in pursuance to a request by the first defendant for a CF to be issued to Block 3, JPS advised MDG to refrain from entertaining such request until a drainage plan is approved and implemented.

On 6 May 1985, the third defendant submitted a drainage plan (exh P34). This plan involves the construction of concrete drains all along the hill slope of Arab Malaysian land starting from the point where the East stream enters lot 3671. Water from here will flow along these concrete channels eastward down slope to join a set the drains along the road reserve at lot 3666. Following the road, the drains then proceed behind the three blocks of Highland Towers in a northerly direction. Then at the end of Block 3 they turn left until they reach Lot 3626. At this point they will be connected to a larger drain situated on lot 445 which belongs to the government. The point of entry into Lot 445 is marked on this plan as 'C'.

On 24 October 1985, P34 was approved by MDG with the consent of JPS.

On 2 December 1985, without the knowledge and presence of any official from JPS, a technical assistant with MDG, one Mohd Harris (DW5) accompanied only by a director of the first defendant went to the Highland Towers Site and inspected a constructed concrete drainage structure located at point 'C' on P34. Such an inspection, according to Dato Gooting, was not the normal practice where usually a representative of JPS would be present. Further, this inspection only focus on a particular section of an extensive approved drainage system. Thus this does not reflect the drainage works approved in P34 has been complied with. After this purported inspection, DW5 returned to MDG and wrote a report stating that the drainage works were duly completed according to plan.

On 24 May 1985, based on the above inspection report, CF for Block 3 was duly issued by MDG.

Plaintiffs' claim and the second defendant's defence

In the plaintiffs' statement of claim, the plaintiffs allege that this defendant held himself out to be a suitably qualified, competent and skilled person to design, prepare and sign architectural and other building plans pertaining to the developments of Highland Towers and the Arab Malaysian land. In the performance of this task, the second defendant has breached a common law duty of care to the plaintiffs to take reasonable care and diligence in ensuring that: the drainage requirement and rubble walls in the Highland Towers Site and the Arab Malaysian land, and the earthworks thereon were adequately and properly designed, supervised during its construction, and in compliance with the requirements as set by the authorities. Further, by these same acts or omissions, the second defendant has created nuisance on the hill slope behind Highland Towers.

The defendant's replies to the plaintiffs' allegations are as follows: Firstly, he does not owe such duty of care to the plaintiffs. Secondly, even if such duty of care exists, it is not breached. He explains that he was only engaged to design the three apartment blocks of Highland Towers and was never involved in the design, supervision and construction of drains, rubble walls and earthworks within and outside of Highland Towers Site. The first defendant, he discloses, carried out these works; he played no part in them. Thirdly, he blames intervening acts of the fourth, fifth, seventh, and eighth defendants in the altering the condition of the area to cause the collapse of Block 1. This he submits, breaks the chain of causation arising from his wrong doings (if any), and exempts him from liability.

Analysis — negligence

Preliminary issue: second defendant not a qualified architect

There was a considerable outcry over the qualifications of this defendant in submitting and dealing with the development, building and other related matters in the Highland Towers Project for reason that this defendant was only a building draftsman and not a qualified architect at the material time. As a building draftsman he was only permitted under the Architects Act 1967 to design buildings of no more than two stories in height and limited floor space. In this case, each apartment block of Highland Towers consisted of 12 stories with a built-up area far exceeding that allowed for a building draftsman to undertake. This defendant seemed to have got round the authorities at that the material time by inducing a relevant government department to grant him a 'specially authorized person' status under a repealed enactment (the Architect Ordinance 1951). This he claims entitled him to summit and oversees construction works of three apartment blocks.

To the plaintiffs, whether this defendant misrepresented himself as to his qualification makes little difference to the duty of care he owes to the plaintiffs. According to the plaintiffs' counsel, ' if a man is unqualified but holds himself out to be possessing a skill, he will be judged by the standards of a reasonably competent qualified person' — see *Jackson & Powell on*

A *Professional Negligence* (4th Ed) at p 86 where the case of *Cardy v Taylor* (1994) 38 Con LR 79, is cited in support.

I am in full agreement with this view. When this defendant had represented himself as a qualified architect to all and sundry, as displayed by his actions, then he must be judged according to the character he had assumed. B

Duty of care by the second defendant to the plaintiffs

As an architect, his duty is primarily to his client because he has a contractual relationship with him. But in law, an architect is also liable to C anyone who is sufficiently proximate and whom the architect could foresee that his act and/or omission would cause damage to that person — see *Halsbury's Laws of England* (4th Ed) Vol 4(2) at para 525. In this case, the plaintiffs are the purchasers of the two apartment blocks designed, supervised and built by the second defendant. At the time when this defendant exercised his duty as an architect for the Highland Towers D Project he must have foreseen that the apartments he built would be sold, and purchasers, their servants and or agents would be occupying them. Thus these purchasers would be closely and directly affected by his acts and/or omissions and for this, he must have or ought to have them in contemplation when he was directing his mind to his acts and/or omissions. By this, I find a duty of care exist between the second defendant and the E plaintiffs who are purchasers of these Highland Towers apartments.

The second defendant has insisted that he was engaged only to design and supervise the construction of the three apartment blocks. He vehemently denies that his scope of work extended to the drainage, earthworks and construction of rubble walls on the Highland Towers Site F and the Arab Malaysian land. And since there is nothing defective in the design of the three apartment blocks that contributed to the collapse of Block 1 then he should not be held liable. And if it relates to the foundation of the Block 1, then the finger should not be pointed at him; it is the responsibility of the third defendant, the engineer. He declares that he had not even been up the hill slope behind Highland Towers before designing G the buildings, let alone being aware of the East Stream, which he only discovered while accompanying the judicial visit.

I think the second defendant is under a serious misapprehension that an architect is engaged just to design and supervise the construction of a building and need not bother with the surrounding area where the building H is to be erected. Surely the primary consideration for the construction of any building, or structure for that matter, besides the aesthetic aspect, is the safety of the building. To achieve this, the condition of the land on which the building is to be built as well as those in the vicinity must be considered and evaluated, particularly if it has potentials adverse effect to the building planned. Like in this case, there was a steep hill right behind the three blocks I of apartments and a stream nearby. Both these elements may affect the ground condition and drainage of the area on which the building stood. These dangers were not unknown to this defendant, as he wishes this court to believe. They were duly brought to his notice by the authorities from the day the layout plan was approved. A

Further, I find that his claim that his work was limited to only the apartment blocks is false. When he submitted the layout plan for approval it included the development of the Arab Malaysian land. When the development plan was approved this hill slope must naturally be part and parcel of an overall scheme for which he must assume certain amount of responsibility. Besides, he has taken an active role in corresponding with the authorities and submitted drainage plans to them. All these are again evidenced in the chronology of events and there is no necessity in singularizing them out. Though the terracing and the construction of the retaining walls on the hill slope may be carried out by the first defendant but he, as architect for the project, must ensure that such work be carried out in a competent workmanlike manner so as not to affect the Highland Towers which he was responsible. He must ensure that no soil from the hill slope would come crashing down on his designs. With this, I cannot accept this second defendant's contention that his scope of work did not include the hill slope and the drainage of the Highland Towers Site and the Arab Malaysian land nor that he had any knowledge of these. B C D

As an architect responsible for building the three apartment blocks, the second defendant must have foreseen the plaintiffs, who were the purchasers of the buildings, would be affected by his acts and/or omissions as stated above. But Mr Choo, his counsel, argues that though this might be so but when there are intervening acts of third parties which his client could not have reasonably foreseen nor could have prevented, then his client should not be made liable for any negligence to the plaintiffs. The intervening acts, Mr Choo claims, were the deliberate acts or omissions of other defendants which caused and/or contributed to the plaintiffs' loss. To support this he cited the case of *Smith v Littlewoods Ltd* [1987] 2 WLR 480. This is a case where some teenagers who were playing in a disused cinema set it on fire. Not only was the cinema destroyed but also the neighbouring properties. Those who suffered brought a claim against the cinema owner. On appeal it was ruled that the defendant should not be held liable because the defendant could not have foreseen such danger or prevented the deliberate acts of the third party (the teenagers) in setting fire to the premises which affected the neighbours. E F G

I do not dispute the principle set out in *Smith v Littlewoods Ltd.* But in our present case, the second defendant did foresee the danger of not exercising his professional skill, care and diligence in attending to the initial and basic factors regarding drainage and the stability of the hill slope. As an architect, or someone who represented himself as one, he must have foreseen the dangers that if no proper, adequate and sufficient drainage system and retention walls were built there would be danger to the buildings erected below. Yet he neglected this basic duty. The intervening acts of the third parties may not be foreseen by him, but if a proper, adequate and sufficient drainage system and retaining walls were implemented and erected then the collapse of Block 1 may not even have occurred. H I

Was there a breach of duty of care?

Having decided that the second defendant owes a duty of care to the plaintiffs, the next issue to determine is whether he has breached such duty of care. In evaluating this, the standard of care to be applied is, as expressed by Justice Windeyer in *Voli v Inglewood Shire Council* (1963) ALR 657 to be:

> An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practicing their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from the breach of his contract or in tort.

From the facts as set out above it is obvious that the second defendant has breached his duty of care to the plaintiffs. He had failed in his duty as an architect and had also refused to comply with the requirements imposed by the authorities on the drainage of the area. Besides he had also colluded with the first and third defendants to obtain CF for the three apartment blocks of the Highland Towers without fulfilling the conditions as set out by the fourth defendant and/or its predecessors. The compliance of these requirements and conditions were part of his duties as an architect and failure to do so is a breach of his duty of care — see the case of *BL Holdings Ltd v Robert J Wood & Partners* (1978) 10 BLR 48 (though this case was reversed on appeal but not on this principle enunciated). Further, though he was aware of the terracing on the hill slope and the construction of the retaining walls which would effect the buildings which he was in charge of constructing, he did not investigate as to whether these were properly designed, adequately provided for and sufficient to withstand any slope failure. His excuse of 'how can I stop my boss from doing anything' and 'though I know I put great danger on everyone but (I) have no choice (for I have) to earn a living' is not only inexcusable but, as this case has displayed, 46 lives were loss as well as properties. On this score, I cannot, but to reiterate my feelings towards such attitude as expressed in my judgment in the case of *Perunding Alam Bina Sdn Bhd v Errol Oh & Ors* [1999] 6 MLJ 101 at pp 109–110 which is:

> Though undoubtedly the ultimate decision of whether to proceed with, or without approved amended plans lies with the proprietor, but when the law is broken, the plaintiffs, as architects, to my mind, must report the matter to the authorities. Otherwise they may not only be an accessory to the commission of an offence but also liable to unprofessional conduct. If everyone adopts the attitude that it is 'the client's decision' and not the architect's, and that in the general practice of the industry to built first before approval, then there is practically no necessity to obtain approval of plans for any building. And if the argument relates to only major changes needs approval first, then where is the line to be drawn between what is major and minor. Is the episode of Jaya Supermarket which built an additional four office floors without prior approval a minor deviation since only a fine was imposed? If this is the attitude

> of the industry to rely on the precedent of Jaya Supermarket experience, then it will be practically forcing the authorities to compromise; very similar to thumping the nose of the authorities. Surely, as citizens and professionals, the plaintiffs must ensure that the law must be followed, even at the risk of being discharged by the client; otherwise, the architectural profession will suffer irreparable damage if allowed to continue with such mentality. A

B

Pure economic loss

Mr Choo (as well as other defendants) has raised the issue that this claim of the plaintiffs cannot be maintained because it is a claim for 'pure economic loss'; the two apartment blocks being the defective product.

C To understand this legal terminology of pure economic loss it is necessary to return to the case of *Donoghue v Stevenson* which commands the basic principle of negligence. In this concept, where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can reasonably be foreseen to be likely to cause physical injury to person or damage to his property other than the damaged property itself. By D this proposition, a person without contractual relationship can claim from another, damages for injury suffered by him or damage to his property, other than the defective product itself. Any claim for this defective product, either in the manner of making good or replacement thereto, is a claim for pure economic loss. The facts in the very case of *Donoghue v Steveson* gives the best illustration. Here, the consumer of a bottle of ginger beer that E contained a dead snail was successful in her claim against the manufacturer of the drink for negligence resulting in injuries to her health and damage to her property (if any). But she could not claim damages on the bottle of ginger beer either in the form of asking the manufacturer to make good this defective product or for a replacement of it. This is because such claim would be considered as a claim for pure economical loss. F

By analogy to the factual situation regarding the second defendant, the plaintiffs' claim against him is actually for pure economic loss. The plaintiffs are asking compensation from this defendant to make good the defective building or for a replacement thereof which he was engaged to build.

G Over the years, arising out of dissatisfaction over this principle of pure economic loss, the common law practicing countries had a change of approach and decided to eradicate this rule. But sadly, the English courts after having agreed to this change reverted back to the old concept that pure economic loss cannot be claimed. This stimulated fierce debate throughout the Commonwealth where common law is followed. Malaysia was no H exception. In the case of *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants* [1997] 3 MLJ 546, I gave my views that claim for pure economic loss in this country can be maintained against a defendant. The reasons for supporting this are comprehensively documented in that reported case and I do not think it wise to add to the growing pages in this judgment. I

On this contention of the second defendant, as well as all those defendants who relied on this defence of pure economic loss, suffice me to

A say that it must fail on the same reasons expressed in the case of *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants*.

Based on the reasons aforesaid, I find the second defendant negligent.

Analysis — nuisance

B The other cause of action against the second defendant is nuisance. To succeed, the plaintiffs must prove that this defendant was an unreasonable user of the neigbouring land to that of the plaintiffs' property and that he did foresee that his acts and/or omissions would cause damage to the plaintiffs. On the first factor, Mr Navaratnam claims that this arose from C the second defendant being one of the creators of the situation on the hill slope behind Highland Towers that gives rise to the nuisance which caused the collapse of Block 1 and forced the plaintiffs to evacuate their apartments. To support this, he cited the text by *Winfield & Jolowicz on Tort* at pp 59–66.

D There is substantial degree of over lapping between nuisance and negligence in this case. Thus there is no necessity to recount the facts and analysis already stated for negligence which is equally applicable to nuisance. Based on the facts and analysis expressed and elaborated when I considered negligence, I find this first factor of the second defendant being an unreasonable user of the land proved. Also satisfied is the requirement E of foreseeability. For this, I find the plaintiffs' claim for nuisance established against this defendant.

The third defendant

F The plaintiffs' claim and the third defendant's explanation

The plaintiffs claim that the third defendant by his acts and/or omissions in preparing, designing and supervising in the construction of Highland Towers and the drainage system of the Highland Towers Site and the Arab Malaysian land was negligent and had caused nuisance to them.

G The third defendant is, and at all material time was, a qualified civil engineer. His brother, the second defendant, appointed him to be the consulting engineer for Highland Towers. Initially, his scope of work was restricted to the structural aspect of the three apartment blocks. But subsequently, when the first and second defendants encountered difficulties with JPS over drainage of the area, the third defendant was engaged by the H first defendant to submit proposals to the authorities to resolve the problem. This resulted in his drainage plan, exh P34, being approved by the authorities. Slightly later, he was also retained by the first defendant to design and supervise the construction of two retaining walls on the Highland Towers Site. Both were in front of Block 2. Other than these, he disclaims responsibility for the remainder of the retaining walls on the Arab I Malaysian land and Highland Towers Site. The first defendant, he insists, constructed these; he has nothing to do with it. Though admitting that he was aware of these walls being built he was under the apprehension that they were designed and supervised by qualified engineers engaged by the first defendant.

Analysis — negligence

The principles or test applicable to determine whether this defendant is liable for negligence is the same as those used in analyzing the liability of the second defendant for this same cause of action, They are both considered as persons possessing special skills — see the case of *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 1 WLR 1095, and thus their conducts are judged according to the standard of a skill and competence of person in their respective profession.

From the particulars listed in the statement of claim the plaintiffs identify three areas of negligence caused by this defendant. The first is on the foundation of Highland Towers, particularly that of Block 1. As disclosed in evidence, used rail piles welded together were accepted as foundation to support of the three apartment blocks. Both Dr Weeks and Prof Simons consider this type of piles as inferior to concrete pile. But as this type of piles was accepted in the engineering and building industry to support high-rise building at the material time in this country no fault can be attributed to the third defendant in approving its use since he was only adhering to the accepted professional practice at the time.

But what I find unacceptable is the lack of consideration paid by this defendant to the hill and the slope directly behind the three apartment blocks. Though the third defendant seemed to have taken comfort on what he claims was the hill of low gradient (10 to 20 degrees as perceived by him) and being some distance away from the building, I am bemused as to how this impression can be formed when the physical appearance of the place was completely different. What I saw during this court's visit to the site and from the photographs and plans of the area taken both before and after the collapse of Block 1, was a steep hill exceedingly close to the three apartment blocks. In fact the hill was so close that this defendant had to design and erect the two retaining walls in front of Block 2 to keep it from intruding into the buildings. In one of the photographs adduced by the fifth defendant, it shows the hill being separated from Block 1 by a narrow alley way. When you had a hill so close and acute then the third defendant should have reasonably foreseen, judging by professional standard as an engineer responsible for the structure of Block 1, the danger of a landslide producing a lateral load against the foundation of the building. For this, he should have exercised care to either design and construct a foundation to accommodate lateral load or ensure that the slope was reasonably stable. Failure to do so is a breach of his duty of care he owes to the plaintiffs since his duty was to ensure the safety of the buildings he designed and built.

The same excuse as the second defendant was offered to disclaim responsibility as to why the slope was not attended to. This is: he (the third defendant) was not involved in the design or construction of the other retaining walls on the hill slope; it was the first defendant who did it. But this view is totally unacceptable since, and as I have stated, the paramount

A duty of an engineer for the Highland Towers was the safety of the buildings he was involved. This duty cannot be exempted by a mere belief of the retaining walls and terracing of the slope were designed, supervised and built by the first defendant, whose director was an engineer himself, or another firm of consultant, and therefore presumed safe. If this was the belief of the third defendant, then it encumbered upon him to inquire and B to ascertain whether: firstly, this other consultant is a qualified professional, and secondly, what he was doing would have any effect on the safety of Highland Towers. To support this view I shall quote a passage from the judgment of Bingham LJ in the case of *Eckersley v Binnie* (1988) 18 Con LR 1 at p 80:

C

> ... a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinarily assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the D limitations on his skill. *He should be alert to the hazards and the risk inherent in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert.* He must bring to any professional task he undertakes no less expertise, skill, and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional E man that he be a paragon combining the qualities of polymath and prophet. (Emphasis added.)

The second area of negligence is in regards to drainage. Though P34, the drainage plan, was approved but it was not fully implemented by the first defendant. The reasons offered by this defendant were: shortage of financial F resources of developer; the need to bring down the road level to fit the drains; and prohibition on rock blasting in the area. On the last reason, evidence has proved this to be false. The second reason is much associated with the first, but to my mind, whatever the excuse may be it did not entitle and warrant the third defendant to issue a notice to the authorities stating that the entire approve drainage proposal was implemented when, G according to my estimates, only 10% was completed. This was a gross violation of his duty of care which, as a consultant engineer for the three apartment blocks, he owes to the plaintiffs as purchasers of Highland Towers particularly when this approved drainage system was so fundamental to the safety of the building. I have reiterated my strong sentiments against this type of attitude of professionals whose only H consideration is to guard and secure their own interest rather than their duties and obligations to those closely affected and the public on which so much faith and reliance are placed on them to carry out their professional duties. I need not elaborate further except to remind this defendant that he has to live out the rest of his life knowing truly well that he had contributed I to the tragedy of Highland Towers.

Based on the above I find the third defendant liable to the plaintiffs for negligence.

Analysis — nuisance

On the cause of action for nuisance, I also find this defendant liable to the plaintiffs. The reasons are similar to that stated under this category of liability for the second defendant which is basically: he who did the first wrong must answer for the damage resulting from it — see *Winfield & Jolowicz On Tort* (14th Ed) at p 514.

Returning to the first defendant

Now that the actions and/or omissions of the second and third defendants are examined and determined I shall return to consider the liability of the first defendant.

Analysis — negligence

On the cause of action for negligence the plaintiffs announce that this defendant owes a duty of care to them in four areas and the first defendant has breached this duty of care.

The first concerns the appointment of competent consultants to carry out the designs, construction and supervision of the architectural and engineering works.

As admitted by the second defendant, he was not a registered qualified architect when he designed, drew and supervised the Highland Towers Project. In fact this was his first job of such magnitude on his own. As decided earlier, he was incompetent and lacking in skill. He failed to consider the effects of the steep hill on the building he was engaged to build. He adopted a narrow view in not considering all other factors that an architect of experience for such type of structures would have taken into account. Worse is his failure to comply with regulations set by the local authority for the drainage of the area, particularly when he knew or ought to have known that unless the drainage of the area was implemented he should not have applied for CF for the three blocks.

The acts and/or omissions of the third defendant are no better. His failure covers: designing of suitable foundation, care and concern of the hill and slope, and the issuance of a notice to the authorities confirming the drainage works was completed when only a fraction of it was done. These are certainly traits of incompetence and lack of skill expected of a professional engineer.

Against these accusations, the first defendant counsel, Mr Rajah argues that though these consultants may be incompetent and lacking in skill but they were independent contractors responsible for their own acts. In such a situation, the first defendant is not liable for the acts of its independent contractors.

Undoubtedly as a general rule, it is a correct proposition that an employer of independent contractor is not liable for the default or negligence of such a contractor. But here the plaintiffs are focusing on the appointment of such personalities, not after they were appointed. This means that before their appointments there was a duty placed upon the first

A defendants to vet through them to ensure that they are competent and possess such skill for the task they are employed to undertake. This involved inquiries and investigations into their credentials and qualifications as can be seen in the Supreme Court case of *Datuk Bandar Dewan Bandaraya v Ong Kok Peng & Anor* [1993] 2 MLJ 234 at p 239. Obviously these were not done. In fact even more extreme happened. Despite being notified by B the second defendant that he was not a qualified architect, the first defendant proceeded to engage him and even allowed him to appoint the third defendant as the consultant engineer for the project. This is surely negligent on the part of the first defendant.

The second area negligence relates to the terracing of the slope and C construction of retaining walls and drains on both the Arab Malaysian land and the Highland Towers Site. Both second and third defendants have expressly declared that it was the first defendant who carried out such works. There is no denial of this assertion by the first defendant. When implementing such works, the first defendant must have reasonably foreseen that such works if insufficient and ineffective would cause the D collapse of Block 1 and result in damages to the plaintiffs, who are his neighbours under the principle of negligence. The retaining walls have proved to be insufficient and inadequate, as disclosed by both Dr Weeks and Prof Simons. In respect of the drains, there are the testimonies of Mr Hooi and Mr Douglas Yee — the hydrology and hydrogeology experts (whose theories and opinions I shall be alluding in the later part of this E judgment) to announce that these were insufficient to effect proper and adequate drainage of water run-offs on the slope and those originating from the East Stream.

With such disclosures I must conclude that the first defendant has breached its duty of care to the plaintiffs and must therefore be liable to the F plaintiffs for negligence in the erection and construction of these retaining walls and drains.

The third area complained of involves diversion of the East Stream from its natural path to the pipe culvert which ran horizontally across the hill slope directly above the three blocks of apartments. According to Dr G Weeks this is exceedingly dangerous, as water should be always, when possible, flow away from residential areas. But who diverted this East Stream? There is a conflict of claims. The plaintiffs of course blame the first defendant for having done this. Though the first defendant never directly denies this, but Mr Rajah drew this court's attention to an aerial photograph taken in 1966 (contain in the MPAJ report — P47) of the Highland Towers H Site and Arab Malaysian land. It shows the East Stream was already diverted across the hill slope before the first defendant became owner of the said properties. This implies that the first defendant could not have performed this diversion. But surprisingly the aerial photographs taken in subsequent years — 1974 and 1975 do not pick up this diversion; it had disappeared. Then subsequently in later pictures it reappeared. It was I certainly there not long before the collapse of Block 1 for Mr Lim — DW1 was in charged of maintaining it before the bungalow lots were sold to the fifth defendant.

To this mystery the plaintiffs counsel offers this cue. He announces that this temporarily disappearance of the division was caused by the first defendant when they terraced the hill slope in preparation for the bungalow lots. After terracing the pipe culvert was incorporated as an integral part of the retaining wall to support the slope. Thus this diversion reappeared in the later pictures.

I find this proposition probable. Looking at the retaining wall and the pipe culvert besides it, the pipe culvert is actually an integral part of the wall. It is not constructed independently and it does not stand on its own. It is a section of the wall. Since the first defendant built this wall it must be inferred that the first defendant also built the pipe culvert. By installing this pipe culvert, the first defendant must be considered to have diverted the East Stream from it natural course. And as declared by Lord Finlay LC in the well-known case of *Greenock Corp v Caledonian Rly Co and another appeal* [1917] AC 556, which is quoted by Abdul Hamid FJ (as he then was) in the Federal Court case of *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286 at p 291:

> It is the duty of anyone who interferes with the course of the stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.

As this pipe culvert was insufficient and inadequate to drain the discharge of the East Stream, the first defendant is liable to the plaintiffs.

The fourth area involves the exception to the principle of an employer who employs an independent contractor to carry out works on its behalf is directly responsible for the manner in which those works are carried out if the works are extra-hazardous in nature. This legal concept is incorporated into our law through the case of *Datuk Bandar Dewan Bandaraya v Ong Kok Peng & Anor* as an exception to the general rule that an employer is not liable for the acts of an independent contractor. But in order for this rule to apply the works involve must be of an extra-hazardous nature. Thus the first question that must be answered before attributing liability to the first defendant for the negligence of his independent contractor ie the second and third defendants is whether the works carried out by these two defendants were extra-hazardous? I do not believe so. What they did or undertook to do involved the normal and usual course of things as expected of them in their respective professions ie to draw plans, submitting them and supervise in the construction of what were approved. There was nothing extra-hazardous in such activities. My concern is that this exception to the general rule of an employer being liable for the act of an independent contractor appointed by him should not unduly expanded. It must be sparing applied, otherwise there will be a danger in exposing every employer to liability when he engages an independent contractor, such as the professionals in this case, to carry out a project which he himself is unable to handle but has to rely and depend on the skills of such person. It is only in cases where the works involved is of an extra-hazardous nature, A and not just hazardous, that the employer assumes full responsibility. For this, I do not agree with the plaintiffs that the first defendant should be make liable for the negligence of the second and third defendants in this area.

B

Analysis — nuisance

Like the second and third defendants, the first defendant is liable for nuisance as one of the creators of the nuisance by its acts and/or omissions as amplified above. Further, as an owner of the Highland Towers Site it had not been a reasonable user of its land for it failed to maintain the drainage system and the retaining walls on Highland Towers Site resulting in the C damages suffered by the plaintiffs who are owners of the two apartments blocks which must be considered as its neighbours. While in the performance of these acts and/or omissions, the first defendant must have or ought to have reasonably foreseen that its acts and/or omissions would cause nuisance to the plaintiffs resulting in the loss mentioned. On this D ground too, I find this defendant liable to the plaintiffs under this cause of action.

The fourth defendant

The nature of the plaintiff's claim

E

The plaintiffs have described the fourth defendant and its predecessors-in-title as the local authority who: (a) processed and granted planing permission and building approval for the Highland Towers Project; (b) supervised the construction of the three apartment blocks of Highland Towers; (c) maintained the Highland Towers and its surrounding area. And F in the course of these duties have caused negligence, nuisance and liability under *Rylands v Fletcher*.

For particulars of wrong the plaintiffs identified six areas.

Firstly, at the planning and design stage of Highland Towers Project, this defendant had not taken reasonable care, skill and diligence in checking G the plans submitted to ascertain whether they are reasonably fit for the purpose it was intended for. This included matters relating to watercourses, streams and rivers in the vicinity of the Highland Towers Site, Arab Malaysian land and the surroundings which were under the jurisdiction of the fourth defendant.

H Secondly, at the construction stage of the Highland Towers, this defendant failed to exercise reasonable care, skill and diligence to ensure the drainage system and the rubble walls on Arab Malaysian land were adequately provided for and/or constructed in a workman like manner before the issuance of the CF to the three apartment blocks.

Thirdly, failure of this defendant to maintain and upgrade drains and I rubble walls on Highland Towers Site and the Arab Malaysian land and to provide adequate drainage requirement to watercourses, streams and rivers after the Highland Towers was constructed.

Fourthly, failure to take any action against damage caused by the Tropic for clearing the Arab Malaysian land.

Fifthly, for failing to take remedial measures to remove, rectify and/or minimize the hazards posed on the Arab Malaysian land and the surroundings after the collapse of Block 1.

Sixthly, in the aftermath of the collapse of Block 1 for failing to prevent vandalism and theft to Block 2 and 3.

A background of the fourth defendant

The fourth defendant is the successor of the following:

Before 1975 the area where Highland Towers is located was under the jurisdiction of District Officer of Kuala Lumpur.

In 1975 when Kuala Lumpur became a Federal Territory the area became a district of Selangor called the Lembaga Bandaran Gombak ('LBG').

Then in 1978 when the State Government of Selangor adopted the Local Government Act, Gombak District Council or Majlis Daerah Gombak ('MDG') as is more commonly known was created.

In 1992, MDG was replaced by Majlis Perbandaran Ampang Jaya ('MPAJ'), the name of the present fourth defendant.

Presently the area is under the jurisdiction of Majlis Perbandaran Selayang.

System of operation

The system of operation between the local authority and the technical department of the State Government of Selangor I have divulged earlier. There is no necessity to repeat except to say that some time after the setting up of the MDG, this local authority was able to recruit some technical personnel — a qualified architect, an engineer and a few supporting staffs. With this, reliance on the Selangor State Government departments was less as time went by except in certain field, such as the drainage and irrigation, where it has no expertise.

Analysis — negligence

Though Mr Viswanathan, leading counsel for the fourth defendant, in his submission made feeble attempts to influence me otherwise, I am convinced that, judging from the facts as disclosed in the chronology of events, the fourth defendant is negligent of the wrongs as stated in the particulars, except for item 4. As a local authority, the fourth defendant owes a duty of care to the plaintiffs to use reasonable care, skill and diligence to ensure that the hill slope and the drainage thereon were properly accommodated before approving building or other related plans, and during construction stage, to comply with and to ensure the implementation of drainage system. Then when CFs were applied for, there should be proper and thorough inspection on whether the buildings so built were safe in all aspect and not just confine

A only to the structure. And after the Highland Towers was erected, to ascertain drainage requirement in the area was adequate to ensure slope stability behind Block 1. Then subsequent to the collapse of Block 1, measures should have been taken to prevent recurrence of the tragedy to Block 2 and 3.

B Besides the above, which are associated with buildings, the plaintiffs have accused this defendant for being negligent in not maintaining the East Stream which is under the jurisdiction of this defendant. To convince me of this, s 49 of the National Land Code ('NLC'), s 3 of the Waters Act 1920 and ss 53–54 of the Street, Drainage and Building Act 1974 ('the 1974 Act') are cited together with the case of *Azizah Zainal Abidin & Ors v Dato* C *Bandar Kuala Lumpur* [1995] 5 CLJ 565. Mr Navaratnam explains that 'River' under the definition section (s 5) of the NLC includes streams and watercourses and any deviation thereof. The ownership of these belongs to the Ruler of the State in which the streams or watercourses are located — see s 49 of the NLC and s 3 of the Waters Act. In our present case the East Stream is definitely in the State of Selangor and therefore His Royal D Highness, the Sultan of Selangor, is the purported owner. But under ss 53–54 of the 1974 Act, the fourth defendant, being the local authority of the area, has a duty to maintain 'watercourses' within its jurisdiction. And 'watercourses' under ss 53–54 of the 1974 Act, as defined in the case of *Azizah Zainal Abidin & Ors v Dato Bandar Kuala Lumpur*, include streams E and rivers. Thus possessed of this duty, Mr Navaratnam alleges that the fourth defendant has breached its duty of care when it failed and/or neglected and is still failing and/or neglecting to maintain this stream, which was a major factor that caused the collapse of Block 1 and is an important element in ensuring the instability of the slope behind Block 2 and 3 at the present moment.

F

I am much convinced by this argument above and based on the facts as disclosed I find such duty of care exist and this duty has been breached by this defendant resulting in damages to the plaintiffs.

Section 95(2) of Street, Drainage & Building Act 1974 ('the 1974 Act')

G

Though negligent for the acts stated, the main thrust of the fourth defendant's defence is its claim for immunity offered by s 95(2) of the 1974 Act which provides:

> The State Authority, local authority and any public officer or officer or H employee of the local authority shall not be subject to any action, claim, liabilities or demand whatsoever arising out of any building or other works carried out in accordance with the provision of this Act or any by-laws made thereunder or by reason of the fact that such building works or the plans thereof are subject to inspection and approval by the State Authority, local authority, or such public officer or officer or employee of the State Authority or the local authority and nothing in this Act or any by-laws made thereunder I shall make it obligatory for the State Authority or the local authority to inspect any building, building works or materials or the site of any proposed building to ascertain that that the provisions of this Act or any by-laws made

> thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

In evoking this provision for the benefit of the fourth defendant, Mr Viswanathan did not fail to remind me of a passage in my judgment in *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultant & Ors* supporting the concept of economical loss is recoverable where I reiterated that (at p 565):

> If there is any fear that this approach may encumber the local authorities to pay out substantial claims due to their negligence in granting approvals or inspecting building works, there is s 95 of the Street, Drainage and Building Act 1974 (Act 133) which prohibits such authorities to be sued.

Faced with this limitation, the plaintiffs counsel advanced the following arguments to overcome this obstacle.

The first is based on the Federal Court decision of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 which says that (at p 45):

> unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the not 'to be challenged, etc kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we may would, inferior courts.

But where are the special circumstances in this case to qualify this court's intervention? The negligent acts of the fourth defendant were not done ultra vires nor were they involved in creating an error in the law. This is a case of negligence and the legislature had promulgated that the fourth defendant, being the local authority, should be excused.

The second is based on the argument that since s 95(2) of the 1974 Act does not harmonize with s 7(3) of the Government Proceedings Act 1956 ('GPA'), and s 124 of the Local Government Act 1976 ('LGA')to be read in line with s 2 of the Public Authorities Protection Act 1948 ('PAPA'), this provisions should not prevail over the latter two Acts of Parliament.

To comprehend this, it is necessary to set out the various provisions of the acts referred. Firstly, s 7(3) of the GPA states:

> Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of *negligence* or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties. (Emphasis added.)

Then s 124 of the LGA says:

> The Public Authorities Protection Ordinance 1948, shall apply to any action, suit, prosecution or proceeding against any local authority or against any Councillor, officer, employee, servant or agent of any local authority in respect of *any act, neglect or default done or committed.* (Emphasis added.)

But in s 2(a) of the Public Authorities Protection Ordinance (which has become the Public Authorities Protection Act 1948) it says:

> Where, after the coming into force of this Act , any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law, duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after *the act, neglect or default complained of or, in the case of a continuance of injury or damage,* within thirty-six months next after the ceasing thereof. (Emphasis added.)

Focusing on the emphasized words in the various sections of the acts above, the plaintiffs' counsel argues that since the cause of action for negligence is preserved even against the local authority and its officer in the various enactment mentioned, then s 95(2) of the 1974 Act, which does not harmonize with these provisions, should not be apply.

I do not agree with this advancement made by the plaintiffs. On the contrary, as I see it, there is complete accord among all the enactment highlighted. Indeed under the relevant sections of the Government Proceedings Act, and the Local Government Act read with the Public Authorities Protection Act, an action or suit for negligence is maintained against government bodies, which includes local authorities, but it does not mean that Parliament cannot create an exemption from liability for certain acts committed by these bodies and its officers. It is my view that s 95(2) of the 1974 Act is just such a piece of legislation to exempt the local authority and its officer from negligent act related to and connected with certain specified activities. In our case, since the acts of the fourth defendant found to be negligent by this court are within those specified activities under s 95(2) of the 1974 Act immunity applies to the fourth defendant .

The third is also associated with interpretation. Mr Navaratnam feels that by applying the established canon of interpretation of statute s 95(2) of the 1974 Act is not applicable. He cited two cases in support. The first is the *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193. The second is a more recent case of *Allen v Gulf Oil Ltd* [1981] AC 1001.

I cannot agree with this contention that s 95(2) of the 1974 Act falls foul with the long established authority on statutory interpretation. In fact both cases cited supports the view that if there is specific provision for exemption then such provision applies. In the case of *Allen v Gulf Oil Ltd* an oil refinery was set up by an English Act of Parliament. The residents in the vicinity of the refinery claim damages for nuisance caused by noxious fume and excessive noise emitted from the refinery. The defendant attempted to seek protection from exemption from liability under an enactment meant for statutory authorities since there is no such provision found in the Act that created the defendant. The House of Lords in deciding against the defendant was of the view that since no express exemption clause from paying compensation was written in the Act that created the refinery then the defence must failed. This is again the view of the same court in the case of *Metropolitan Asylum District v William Lund*, where the Law Lords rejected a claim by the defendant for protection from tortuous liability under a statute because no express words or by implication show that such protection exist in the statute claimed. But when there is such express provision provided, as in our present circumstances, then such protection applies.

The fourth argument tendered by the plaintiffs is that the fourth defendant when exercising its duty in approving building and development plans discovered a danger or created one, then s 95(2) of the 1974 Act offers no protection since this act and/or omission (of discovering a danger or created one) is no longer within the parameters of s 95(2). To support this two cases are cited — *Capital & Counties v Hampshire CC* [1997] 3 WLR 331 and *Pyrenees Shire Council v Day* (1998) 72 ALJR 152.

I need not discuss these two cases in detail since I believed that they are not applicable in view of the wordings in our s 95(2) of the 1974 Act. This s 95(2) covers situation 'whatsoever arising out of building or other works carried' out by the fourth defendant in accordance with the provision of the said Act 'or by reason of the fact that such building works or the plans thereof are subject to inspection and approval'. By the usage of the phase 'whatsoever arising' to relate with the specific acts described then it must include any consequences arising from such specified acts. Danger discovered or created in the course of the fourth defendant's specified acts are certainly consequences or a result of such specified acts — thus falling within the provision of s 95(2) of the 1974 Act.

The sixth argument submitted by the plaintiffs is that this s 95(2) of the 1974 Act only offers immunity to acts stated in the provision. It offers no protection for any act and/or omission by the local authority not mentioned or specified in this section. To support this proposition the authority of *Sivasubramanian v Chong Cheong Wah & Anor* [1973] 1 MLJ 157 is cited. In this case the defendant, a police officer, seized a book from the plaintiff was charged by the plaintiff for the return of the book as well as damages for its detention of the book. The defendant pleaded s 18 of the Control of Imported Publications Act 1958 which provides that no legal proceedings whatsoever shall lie, instituted or maintained in any court for account of any publication seized, detained, confiscated or destroyed. Syed Othman J (as he then was) considered that this provision only allows the defendant to claim immunity if the seizure of the book was carried out under the provision of the Control of Imported Publications Act and does not apply when the subject matter was seized under Internal Security Act 1960.

I am in full agreement with the view expressed by the learned judge as stated above but the acts of negligence I found committed by the fourth defendant, except those committed post-collapse of Block 1, are within the terms described in the 1974 Act because with the conjunctive words under s 95(2) to include 'other works carried out in accordance with the provision of this Act', all drainage and stream relating to the Highland Towers Project would be within the ambit of the immunity provided for in

A s 95(2) of the 1974 Act. Thus, for these no claims can be brought against this defendant.

The seventh argument put forth by Mr Navaratnam concerns the acts committed by this defendant post-collapse of Block 1. He submits that for these, which is not associated with building, s 95(2) of the 1974 Act will not B apply. He has in mind the fourth defendant's failure to attend to the drainage problem after the tragedy. This he claims is no longer connected or arising out of any building or other works carried out in accordance with the 1974 Act. To reinforce this proposition, Mr Navaratnam cited a passage by Lee Hun Hoe CJ Borneo in the Supreme Court case of *Government of Malaysia & Anor v Akasah bin Ahad* [1986] 1 MLJ 396 where he says (at C pp 398–399):

> It is the contention of the defendants that they are not liable for nuisance under s 7 of the Government Proceedings Ordinance 1956. We are not concern with public nuisance which is covered by s 8. Clearly, s 7 permits a person to sue the Government for negligence or trespass. However, the liability of the Government in tort is set out in s 5 which reads:
>
> D '5 Subject to the provisions of this Ordinance, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, E any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.'
>
> This section is wide enough to cover private nuisance. It makes the Government liable in tort in respect of any breach of duties attaching at common law to the ownership, occupation or control of property as though it F were a private person. The effect of this section is to render the Government liable in nuisance in respect of property it occupies or owns. This refers only to duties existing at common law. From liabilities imposed upon owners or occupiers by the statute the Government remains immune unless the statute imposing the liabilities itself applies to the Government.

G Though I have agreed that the maintenance of the East Stream is and was under the jurisdiction of the fourth defendant, but I must maintain that until the time of the issuance of the CFs for Highland Towers all acts and/or omissions of the fourth defendant in relation to this stream must be considered as matter arising out of the building or any works carried out in accordance with the provision of the 1974 Act. Thus s 95(2) of the 1974 H Act applies to acts and/or omissions committed by the fourth defendant pre-collapse. But for those committed post-collapse, I agree with plaintiffs' counsel that since there is no longer building or other works carried out in accordance with the 1974 Act to associate the East Stream with, then immunity from liability under s 95(2) of the 1974 Act is not available to the fourth defendant if it is found liable for any negligent act relating to the East I Stream. If one were to argue that 'other works carried out in accordance with the provision of this Act' in the said s 95(2) would cover situation such as this, then it is my opinion that such a provision must be interpreted in

A accordance with the ejusdem generis rule to defeat this approach. With the specific word 'building' mentioned in the said s 95(2) before the phrase: 'other works carried out in accordance with the provision of the Act', the latter becomes a general description of the former and must be confined to objects of the same class or kind as the former. It cannot stand by itself to cover every act committed by the fourth defendant in accordance with the provision of the 1974 Act. If Parliament had intended this, the august B House would not have singled out the works 'building' as well as subsequently repeating it in the same provision with: 'building works or plans'. They would have simply just expressed it by saying, 'all acts carried out under the said Act shall be entitled to immunity'.

C To consider whether the fourth defendant is liable for the acts and/or omissions committed post-collapse, it is necessary to disclose some events that transpired after the collapse of Block 1. After the Highland Towers calamity there were efforts by the fourth defendant to stabilize the hill slope on Arab Malaysian land to ensure that no accident of the kind that caused the collapse of Block 1 would occurred to Block 2 and 3. In January 1995, D there was a briefing called by the fourth defendant which was attended by the fifth defendant and some others. They were told by the fourth defendant that a master drainage plan for the entire area to accommodate all landowners in the vicinity of Highland Towers would be prepared. It was announced that the consultant engaged by the fourth defendant, M/s EEC would be ready with the master drainage plan within three months from the E date of the briefing. It was obvious that any master drainage plan for the area must cater for the East Stream. It was substantially due to this East Steam not properly attended to that Block 1 collapsed. In fact this concern of the East Stream, from the chronology of events as set out, was highlighted by JPS from the very beginning of the development of the Highland Towers Project. Thus the task to incorporate the East Stream into the F comprehensive master drainage plan falls upon the fourth defendant who is the body in charge of this watercourse.

But after a period of one year there was no sight or news of this plan. After numerous reminders by the fifth defendant of such a plan, the fourth defendant on 29 September 1996 held another briefing. This time, the G fourth defendant informed the attendees that a new firm of consultant, by the name of KN Associates, was engaged to replace the previous. Again the fourth defendant gave an assurance that a comprehensive drainage plan of the area would be forth coming with this replacement of consultant. Sad to say, until the time when all evidence for this case was recorded by this court, H no comprehensive master drainage plan for the Highland Towers and its surrounding area was adduced by the fourth defendant. In fact this defendant offered no explanation as to why its promise was not met. These delays had affected the fifth defendant who insists that without a master drainage plan of the area approved and implemented by the fourth defendant, and the retaining walls on their land as well as those on Highland I Towers Site are corrected or rectified, then very little can be done by anyone to secure the stability of the slope behind Block 2 and 3.

Despite this pressing need and the obvious knowledge of the urgent requirement for a master drainage plan (for otherwise the fourth defendant would not have initiated steps to appoint consultants for this work soon after the collapse of Block 1) to secure the stability of the slope so as to ensure the safety of the two apartment blocks, the fourth defendant did nothing after the respective consultants were unable to meet their commitments. The plaintiffs and all other relevant parties are kept waiting because of the fourth defendant . This is certainly inexcusable and definitely a breach of the duty of care owed by the fourth defendant to the plaintiffs for not even fulfilling its obligation towards maintenance of the East Stream. For this I find the fourth defendant liable to the plaintiffs for negligence.

Lastly, the plaintiffs have also alleged that the fourth defendant failed to take any action against the Tropic in clearing the fifth defendant's land. I shall be elaborating in detail the acts of Tropic when I analyze the position of the fifth defendant and Tropic. For the present moment, suffice me to say that I do not consider the fourth defendant liable to the plaintiffs in respect of the action committed by Tropic.

As for the claim of the plaintiffs on the fourth defendant for failing to prevent vandalism and theft to Block 2 and 3, I allow it and my reasons will be intimated in the later part of this judgment.

Analysis — nuisance

By the acts and/or omissions of the fourth defendant elaborated above, I also find that the fourth defendant is an unreasonable user of its land in failing to maintain the East Stream post collapse which is under its care. Its acts and or omissions are foreseeable to cause a damage to the plaintiffs — its neighbour. For this, I find the fourth defendant is also liable to the plaintiffs for nuisance.

Statute of limitation

Before I leave the arena of liability of the fourth defendant there is still one other matter to discuss. This involves the assertion of the fourth defendant that the plaintiffs' claim is statute barred under s 2 of the PAPA which requires the suit against the fourth defendant to be commenced 'within thirty-six months' next after the act, neglect or default complained of or, in the case of continuance of the injury or damage, within thirty-six months next after the ceasing thereof.

I find no merits in this contention. The plaintiffs brought their action well within the time limit stipulated in the provision cited and which should be considered to commence from the date of the collapse of Block 1. Further, since the injury or damage to the plaintiffs are still continuing and has not ceased then limitation of time to commence action against the fourth defendant has not even started to run.

The fifth defendant A

The plaintiffs' claim

The plaintiffs' claim against the fifth defendant is in respect of two periods: pre-collapse and post-collapse of Block 1. The areas of complaint during the time of pre-collapse are: B

(a) negligence and nuisance for failing to periodically investigate and to ensure the drains and rubble walls on Arab Malaysian land were repaired, maintained and/or upgraded;

(b) negligence and nuisance for activities committed by Tropic;

(c) liability under *Rylands v Fletcher* for the maintenance of dams and reservoirs on Arab Malaysian land. C

For post-collapse:

(a) negligence and nuisance for failing to take measures to restore the stability of the Arab Malaysian land; D

(b) negligence and nuisance resulting in the looting and vandalism of the plaintiffs' property in the two apartment blocks.

Events and background

Before analyzing the liability of this defendant, a brief history of the Arab Malaysian land is essential. E

As disclosed the fifth defendant became owners of the 50 lots of Arab Malaysian land (lot 3620 to 3673, excluding lot 3628, 3653, 3665 and 3670) in 1991 after some loan facilities associated with the first defendant were not repaid. To set off these loans, the fifth defendant purchased these 50 lots with the objective of selling them as soon as possible in the open market to recover the amount spent. Bank Negera (the Central Bank) approved this deal (since the fifth defendant is a financial institution) with a condition that the fifth defendant was only to hold this property for only a period of a year from date of purchase. F

Except for information contained in a valuation report prepared in 1985 for the purpose of the said loan facilities associated with the first defendant, the fifth defendant, its servants and/or agents seldom visit the land. Even when visits were made only a cursory glance was offered. G

According to the evidence of Mr Lim (DW1) he attended to the drainage of the Arab Malaysian land before it was sold to the fifth defendant. His duties included the clearing of drains and vegetation and repairs. But since the fifth defendant became the owner he was instructed by the first defendant to cease such duty. From then on no one from the fifth defendant came to assume his duty. H

In the latter part of 1992, the fifth defendant secured a buyer for the Arab Malaysian land. This was Tropic who paid an initial deposit equivalent to 10% of the purchase price. They then entered into the land and commenced clearing. This caused severe floods to the car parks in the I

Highland Towers accompanied by mud and rock from the slope. According to PW6, one Dr Kok Mei Leng, she noticed a landslide on the slope following the acts of Tropic. As a result of this, Miss Seow, DW8, a senior officer of the fifth defendant who is and was in charge of the Arab Malaysian land received a telephone complaint from one Mr Jerry Lim of the first defendant about the effects caused by Tropic. She acted immediately on this by requesting a colleague, Puan Lutifah — DW9 to investigate. DW9 did go to the site but only observed it from a corner of Highland Towers. She did not enter the Arab Malaysian land. Obviously satisfied that the complaint was genuine, she returned to her office and wrote a letter to Tropic demanding Tropic to discontinue with whatever they were doing. On 5 May 1992 Tropic replied to say that they will cease their activity on the land.

Except for a few bags of sand placed across the road at a section of the Highland Towers Site, which was completely inadequate and ineffective since a heavy downpour had washed them away, nothing was done to prevent the damage caused by the acts of Tropic. However as vegetation reestablished itself after the Tropic stopped their work, no further complaint of flooding was reported.

But as candidly admitted by Miss Seow, since the fifth defendant bought the land no steps were taken to maintain the land. The reason was: 'we (had) intended to sell it'. But the fifth defendant remained owner of this said land till today. Its attempt to sell it was not successful, not even to Tropic, who failed to pay the balance of the purchase price.

Events that followed after the collapse of Block 1 concerning the fifth defendant are already disclosed rendering it unnecessary to repeat. To date, not much work has been carried out on the Arab Malaysian land except some minor temporary measures recommended by the fifth defendant's experts. This approach is adopted by the fifth defendant on the belief that unless a comprehensive drainage plan of the whole area is implemented by the fourth defendant and the retaining walls on the Highland Towers Site are rectified, any remedial work on its land is ineffective and futile.

Causation

Mr Abraham in his submission argues that the plaintiffs must prove that the acts and/or omissions of the fifth defendant was or were the effect cause, or the causa causans of the collapse of Block 1 leading to the forced evacuation of the plaintiffs from Block 2 and 3. To decide on this, reference must be made to my finding on the cause of collapse of Block 1. Since it is already decided that it was due to a landslide caused primarily by water which emanated from the damage pipe culvert and the inadequate and unattended drains on the fifth defendant's land, then the plaintiffs have sufficiently proved the causa causan of the collapse of Block 1 leading to the forced evacuation of the plaintiffs from Block 2 and 3, was due to the acts and/or omission of this defendant in not maintaining these watercourses.

Analysis — negligence

I shall now commence to deal with the first cause of action — negligence. Foremost, the fifth defendant has denied that it owes a duty of care to the plaintiffs. Basically, to impose a duty of care on the defendant, three criteria must be fulfilled: that of the foreseebility by the defendant of its act would cause injury or damage to the plaintiff; proximity of relationship between the parties; and the reasonableness or otherwise of imposing such a relationship.

Commencing with the first criterion, Mr Abraham, leading counsel for the fifth defendant, stresses that the fifth defendant could not have foreseen the seriousness of the injury or damage caused by the acts and/or omissions of the fifth defendant. The collapse of Block 1 was not a reasonable probability but more of a 'fantastic possibility'.

I find this contention completely devoid of merits. From the factual circumstances as disclosed, I find that the fifth defendant could reasonably foresee that by its acts and/or omissions in failing to take care of its land, it would cause a landslide that would destroy Block 1 and forced the abandonment of Block 2 and 3. When the fifth defendant became associated with the Arab Malaysian land it was in the capacity of a chargee. Before the land was charged, a valuation report — D85 was submitted by the chargor to the fifth defendant. In it was a description of the land with photographs as illustration. These photographs reveal the terrain of the land being extremely steep supported by high rubble retaining walls. From this, the fifth defendant should have been aware of the nature of the land and its venerability to slope failure if unattended. Yet when the fifth defendant became the owner of the said land it was callous in its attitude towards this factor. The fifth defendant's officers involved seem to believe that a vacant piece of land need not be bothered with. Though officers of the fifth defendant were sent to inspect the land periodically, they were never concerned with the physical aspect of it; they only concentrated on whether any trespassers had got onto the land. Even on this, I could not comprehend how this could be achieved without going into the land itself, especially when the area, as Miss Seow has described, was covered with vegetation. This attitude and practice seem to continue despite the complaints of the flooding caused by the activities of Tropic. Puan Lutifah, who was sent to investigate only stood at the bottom of the hill to looked at the land. She never entered the land to find out what was the cause of the floods. If she had been more concerned and proceeded onto the land she would have discovered the state and condition of the drains, and the drainage of the area which were highly inadequate and unattended to as confirmed by various witnesses who went up to the Arab Malaysian land soon after the collapse of Bock 1. Coupled with any blockage, such as those caused by Tropic, the land would be a potential danger to those residents living down hill. Such failure and neglect by the fifth defendant servants and/or agents must be attributed to the fifth defendant and be considered as the fifth defendant having known or ought to have known of the consequences for not attending to its land. I am not alone on this view. Richard Malanjum J in

A *Takong Tabari v Government of Sarawak & Ors* [1996] 5 MLJ 435 at p 459 supports this proposition. Though this is a case concerning nuisance, but the application of this principle is similar to that of negligence since in nuisance one of the criteria is also foreseeability.

On Mr Abraham's claim that his clients, or for that matter any B reasonable man, could never have foreseen that its acts and/or omissions could produce consequences of such magnitude as the collapse of Block 1 and the forced evacuation of the plaintiffs from their properties, it is necessary to be reminded of the test set out in *Steward v West African Terminal Ltd* [1964] 2 Llyod's Rep 371 at p 375 where Lord Denning says:

> C It is not necessary that the precise concatenation of circumstances should be envisaged. If the consequence was one which was within the general range which any reasonable person might foresee (and was not of an entirely different kind which no one would anticipate) then it is within the rule that a person who is guilty of negligence is liable for the consequences.

Applying this principle to the present set of circumstances, I find that a D reasonable man might foresee that a steep hill slope of a nature as that in the Arab Malaysian land would collapse if not properly managed and attended to, and with dwelling structures like that of the Highland Towers situated downhill, the damage cause would be those as happened in this case. Thus the collapse of Block 1, as well as the forced evacuation of the two other structures which still remain standing, are not entirely E unanticipated.

The next criterion is proximity of relationship. This is in reference to those persons (neighbours) who are so closely and directly affected by the defendant's act that the defendant ought reasonably to have them in contemplation as being so affected when the defendant was directing his F mind to the acts and/or omissions which are called to question.

Geographically, the plaintiffs' properties are just below the fifth defendant's hill slope. The parties are in fact immediate neighbours. The fifth defendant cannot deny that it has no knowledge of the presence of the plaintiffs on Highland Towers as its officers visiting the Arab Malaysian land would have noticed that the buildings were occupied. CFs for the G Highland Towers were issued long before the fifth defendant purchased its land. With these, I find that the fifth defendant ought to have reasonably foreseen that its acts and/or omissions in dealing with its land of a nature and condition before the collapse of Block 1 would likely to cause damage to the plaintiffs.

H On the third criterion of reasonableness in imposing such a relationship, there is no excuse for the fifth defendant to say that: its intention was to hold the Arab Malaysian land on a temporary basis; that the walls and drainage system thereon were not erected by it; that it was unaware of the inadequacies of these structures; and finally that it did not actively adopt or utilize these drains and walls. The last of these excuses is I most absurd. If these drains and retaining walls were not utilized by the fifth defendant, I wonder what supported the slope and drained the water from it before the collapse of Block 1? Other reasons will also not exculpate this defendant from imposing such a relationship. The fifth defendant is, and at the material time was, not an institution of little means or without personnel who could make an effort to inspect its property. Such effort was relatively simple — just enter into the land and observe. If only those officers who were send to inspect and to investigate had taken a little trouble then they would have discovered all the deficiencies on the slope and made recommendations for corrective and preventive measures which could have avoided the tragedy. But sadly, this small step was not made.

By the reasons listed above, I find that the fifth defendant owes a duty of care to the plaintiffs. Having established this, the next question to be answered is whether the fifth defendant has breached this duty of care? The answer to this is substantially based on my finding on the cause of collapse of Block 1. But before I proceed to it one argument raised by Mr Abraham must be attended to. He is of the view that since some of the retaining walls and drains, as shown on the post-collapsed survey plan, were on roads reserves and boundaries of bungalow lots then such structures did not belong to the fifth defendant and consequently the fifth defendant should not be liable for negligence for failing to maintain these.

I find this reasoning has two shortcomings. Firstly, the post-collapse survey plan only shows those structures that are still standing. Those washed away by the slide and subsequent clearing of the area are no longer visible. This includes the High Wall and other structures behind block 1. Without their exact location established how could the fifth defendant confirmed that these were not on its land. In fact a substantial number of walls still standing are located on the fifth defendant's land itself, as can be seen from the post-collapse survey plan. Secondly, this proposition of Mr Abraham was made before the cause of collapse of Block 1 was determined by this court. With the ascertainment of the cause of collapse being attributed to water, derived primarily from the leakage of the pipe culvert, which is and was on the fifth defendant's land, as well as surface water from rainfall percolating into the fifth defendant's land, the location of these walls and drains is of little significance. For this, I find this excuse raised by Mr Abraham cannot be sustained.

As stated above and in my reasons given on the cause of the collapse of Block 1 — water was major culprit. This was followed by the poorly designed and constructed walls and inadequate, unattended and defective drains. Concentrating on water, this emanated from the leaks from the pipe culvert and the surface flow from rainfall. If the pipe culvert had been maintained and if there was a proper, adequate maintenance of the drainage system water would not have saturated the ground to cause the collapse of the High Wall. But it did happen and from the evidence adduced it was due to the failure and/or neglect of the fifth defendant in not maintaining these. In fact, as admitted by Miss Seow, the fifth defendant had not taken any steps to maintain the slope. For this, I find that the fifth defendant has breached its duty of care to the plaintiffs.

In respect of post-collapse, I am of the view that this duty of care to maintain the slope on the Arab Malaysian land continues after Block 1 had fallen. Except for some diversions of water to a siltation pond further down slope the fifth defendant did nothing else. The fifth defendant seems to be passing the blame for its non-activity to the fourth and first defendants for either not implementing a comprehensive drainage plan or neglecting to ensure that the retaining walls on the Highland Towers Site are rectified. I find this completely untenable. There is so much the fifth defendant can do on its land. It can at least prevent water from flowing in an uncontrolled manner over its slope. The earth drains can be replaced by concrete drains and if there is still water flowing into the pipe culverts then this should be repaired. Then there are the retaining walls on its own land. These can be repaired and/or strengthened or replaced with better ones. Vegetation can be cleared and allowed to grow in a more regulated manner to utilize its full advantage to maintain the stability of the slope. All these can be adopted instead of waiting. For this, I again find the fifth defendant negligent in failing in its duty to the plaintiffs for the post-collapse allegations.

Analysis — nuisance

Locus Standi

Against the allegation of the fifth defendant causing nuisance, the first point raised by the fifth defendant is that the plaintiffs do not have sufficient interest in the their properties to bring such a suit under this cause of action; the plaintiffs are not registered owners of the land on which their apartments are built and they do not possess strata title to their lot. To support this contention, Mr Abraham quoted a passage by Lord Goff in *Hunter & Ors v Canary Wharf Ltd and another appeal* [1997] 2 All ER 426 at p 438 which says:

> It follows that, on the authorities as they stand, an action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can only be sued if he has a right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally however, as *Foster v Warblington Urban District Council* [1906] 1 KB 648; [1904–7] All ER Rep 366 shows, this category may include a person in actual possession who has no right to be there; and in any event a reversioner can sue in so far his reversionary interest is affected. But a mere licensee on the land has no right to sue.

I think this issue is much associated with the question of locus standi of plaintiffs number 44 to 73 to bring this action against the defendants. I have given my reasons why these plaintiffs can proceed with their claims. These will be similarly applied here thus requiring no necessity for repetition. As possession is the only criterion for this rule and not the requirement of being a registered owner then, the plaintiffs amply qualify. The plaintiffs certainly do have exclusive possession of their respective properties and thus, posses every right to bring this action for nuisance.

Was the fifth defendant a reasonable user of its land A

Having decided on the above, I shall now move on to determine whether the fifth defendant was a reasonable user of its land. To begin with, this defendant claims that it did not create any nuisance. If the nuisance originates from the drainage system and the retaining walls then the fifth defendant is not responsible for placing them there. The first defendant B constructed them and the fifth defendant maintains that it never adopted them to constitute having continued with such nuisance created by the first defendant.

To determine this, the test set forth by Lord Wilberforce in the Judicial Committee of the Privy Council case of *Allan William Goldman v* C *Rupert William Edeson Hargrave & Ors* [1967] 1 AC 645 is relevant. It is (at p 663):

> … the law must take into account of the fact that an occupier on whom the duty is cast has, ex hypothesi, had his hazard thrust upon him through no seeking or fault of his own. His interest, and his resources, whether physical or material, may be of a very modest character either in relation to the D magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking E or removing it, and the ability to abate it. … the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. …

Thus the first element for consideration is whether the fifth defendant knew of the hazard. The hazard in this case was the insufficient, defective and F unattended drains. Though I agree that the fifth defendant may not have knowledge of this hazard at the time of the fifth defendant becoming owner of the land, and the hazard may not even have existed then, but after being notified of the flooding at the car parks in Highland Towers, the fifth defendant should have investigated especially when the complaint was that the flooding emanated from the fifth defendant's land. But if the fifth G defendant choose to ignore it instead of probing which, if it did, would have certainly discovered the existence of the hazard, then the fifth defendant must be considered to have constructive knowledge of the hazard. This lack of care to investigate or even making some effort to look after its land does not absolve the fifth defendant's claim of lack of knowledge of the hazard that caused the nuisance. H

Having knowledge of the hazard, the next question is whether the fifth defendant could foresee the consequences of not checking or removing it? On this point, my answer is in the positive. To a reasonable man the consequences caused the activities of Tropic resulting in flooding of the car park in the Highland Towers accompanied mud and rocks and a minor slip I on the slope was a pre-warning of an impending major land slide if no action is taken to abate it. Yet the fifth defendant paid no heed.

A On the ability to abate, I cannot find any excuse as to why the fifth defendant could not perform such task. The complaint of flooding was lodged directly to the fifth defendant and all that was necessary was for the fifth defendant's personnel to, after inspection, to take remedial measures. This did not require substantial and enormous financial or physical means. In fact the abatement involved very little effort. All that was necessary was B to maintain and improve the drainage system mentioned. Surely, the fifth defendant, as the leading financial house in this country could spare a little sum to perform such menial task. But, this was not carried out.

Given the circumstances of this case and applying the common law principle to nuisance as set out in the earlier part of this judgment, I am C convinced that the defendant caused an actionable nuisance to the plaintiffs.

Regardig post-collapse I also find the fifth defendant liable for actionable nuisance. The nuisance is still continuing and the fifth defendant has not taken any measures to effectively abate it. I need not repeat the circumstances constituting this since it is well documented under the D liability of negligence.

Vandalism

Since the issue on the liability of the fifth defendant on negligence and nuisance is decided, it is appropriate at this stage to consider whether the E fifth defendant (as well as all other defendants who oppose this) is also liable for the acts of vandalism and thief committed on Block 2 and 3.

In the leading English authority of *Ward v Cannock Chase Council* [1986] 2 WLR 660, Scott J faced with an almost similar situation as in this case perused extensively through the authorities related to remoteness of F damages. His conclusion was to apply the test of whether: 'the vandals and thieves was a reasonably foreseeable consequence of one of more of the breaches of duty committed by the council (defendant).' I find this a reasonable and logical approach and shall adopt it for application to the circumstances at hand.

G Considering the local condition, I find that when disaster strikes in our country, such as a road accident or when a fire gutters a building, there will be certain uncivil and contemptuous elements who take advantage of such commotion to rob, steal and plunder. The Highland Tower tragedy was no exception. Though security forces were present but with the need at that material time to safe lives as well as preventing curiosity seekers from H entering the site, which was then considered unstable, it is foreseeable that their strength and effectiveness in guarding the properties in Block 2 and 3 were less effective leading to the vandalism on the plaintiff's properties. When public security was reduced to only daylight hours the vandalism intensified. This must be expected. The plaintiffs could not employ their own security personnel since they were not allowed to enter the buildings. I Even if they were allowed in, the fear of these two building collapsing would have deterred such arrangement. All these, I find, were reasonable consequence of the landslide that brought down Block 1 caused by the acts of the fifth defendant as well as all other defendants who contributed to this. Based on these, I find the fifth defendant liable for thief and vandalism caused to to Block 2 and 3. A

The sixth defendant

The claim by the plaintiffs against the sixth defendant is for negligence and nuisance. Though this defendant did not enter appearance the plaintiffs did not obtain interlocutory judgment against it. For this, this court has to consider whether the plaintiffs' claim against this defendant is sustainable. B

Analysis

C

There is no necessity for me to recount the facts concerning this defendant since it has been disclosed during the analysis on the liability of the other defendants, particularly that of the fifth defendant. Judging by those facts I do not find that this defendant is negligent or committed nuisance. There is no evidence advanced to link the acts of this defendant in excavating and clearing the Arab Malaysian land to the cause of the landslide that tumbled Block 1. The acts of this defendant did bring about floods to the car parks of the Highland Towers, of which the fifth defendant should have investigated and if it did would have discovered the hazard on the slope, but Tropic did not cause the Highland Towers tragedy nor the damage to the plaintiffs. D

E

For this reason, I find that the sixth defendant is not liable for the claim against it.

The seventh and eighth defendant

Plaintiff's allegations F

According to the plaintiffs between 1990 and December 1993, the eighth defendant was the lawful occupier of the Metrolux land as project manager for and on behalf of the seventh defendant. In the course of the development of the Metrolux land, the plaintiffs alleged that the seventh and eighth defendants' servants and/or agents carried out extensive and widespread clearing by cutting down trees, plants and vegetation which caused a change in the flow direction of the natural water path. This led to concentration of water run-off to the Arab Malaysian land. Alternatively, the clearing of the Metrolux land had caused greater surface run-off of water resulting in higher infiltration and percolation into the soil. In turn, these charged the Arab Malaysian land with water to cause the landslide which brought down Block 1 and the forced abandonment of Block 2 and 3. The following are listed as the particulars of negligence of these defendants: G H

(1) Failed to consider the impact of their works on the drainage requirements of the neighbour's lands.

(2) Failed to take any or adequate precautions to ensure that water from Metrolux land would not surcharge the Arab Malaysian land and Highland Towers Site to reduce slope stability. I

(3) Diverted water to the neighbouring land.

(4) Block the flow of streams and watercourses.

(5) Deposited filth, mud, silt and other materials in streams and watercourses.

(6) Caused erosion, escape of filth, mud and silt from Arab Malaysian land to the Highland Towers Site.

(7) Created hazards on Metrolux land.

In support of the plaintiffs' claim, two material witnesses testified — Mr Rickard (PW4) and Mr Hooi (PW10).

Rickard's evidence

According to Mr Rickard, a resident of Highland Towers for three years prior to the collapse of Block 1, he tracked up the hill behind Highland Towers on 8 January 1994.This was some twenty-two days after the collapse of Block 1. He followed the East Stream until he reached the top. This spot he identified as the Metrolux land which stood on a ridge known as Bukit Antarabangsa. On it he saw 'total deforestation' with 'serious erosion and scars'. One particular item which caught his attention, and of vital importance to the plaintiffs' case, was an earth bund (East West Bund) running east to west across Metrolux land at the southwestern corner, as well as a silt pond close by. He described this East West Bund as an earth bund of one meter in height created for the purpose of blocking the natural flow of water coming from the higher sections of the Metrolux land to the lower level in the north and directing it to the East Stream. Having no camera with him, no picture was recorded of this.

On 15 January 1994, this witness went up again to the Metrolux land from Highland Towers following the East Stream. This time he noticed heavy siltation in the stream with vegetation flattened on either side. He noticed that the East West Bund was still in existence. No photograph was again taken.

Then on 7 February 1994, as a member of the ad hoc committee of the resident association of Highland Towers, he accompanied some Inquiry Commission members who included Dr Nik Ramlan, to the Metrolux land. This time he brought along a camera which captured a number of valuable photographs depicting the condition of the area at the material time. Two things struck him on this visit. Firstly, the East West Bund was demolished. However from the photograph P10, he pointed out the remnants of this. Secondly, he found along the edge of the southern corner of the Metrolux land, at the entrance of the East Stream, a newly constructed earth retention wall ('Earth Retention Wall') built right up to the boundary of the Metrolux land. With this structure, effectively, this court was told subsequently by the seventh and eighth defendants' witnesses, no water could be discharged to the East Stream from Metrolux land.

Some six days later, Mr Rrichard went up the East Stream again and with a camera he took a series of photographs which are displayed in exh P10. These pictures reflect the narration of this witness that this stream was heavily silted with sandy deposits right up to the area where the water entered the pipe culvert. The pipe culvert, he stresses, was in an exceeding poor condition, broken at various intervals with water leaking therefrom.

Brief description of Metrolux land in connection to East Stream

Before proceeding further, it is necessary to elaborate briefly the nature of the Metrolux land in relation to the East Stream. The Metrolux land is vast, consisting of many acres. Development of residential houses was initiated in the north, the lowest part of the land. In the other parts no construction had commenced at the time of the collapse of Block 1 but the area was denuded of vegetation. As one proceeds south, the land rises steeply with two hillocks on its extreme sides forming its boundary. The East Stream is at the far southeastern corner of this part of the land. Since this southeastern corner was the subject of intense study by experts on drainage, I shall refer to it as the Metrolux Site to differentiate it from Metrolux land which covers the entire area belonging to the seventh defendant .

Hooi's evidence

Mr Hooi is a civil engineer with vast experience in the field of water technology. He has, at the commencement of his testimony, disclosed that his sister owns an apartment in Highland Towers but he declared that this had not and would not influence him in his preparation of an expert report and in the oral testimony he was to give. By his demeanor and the quality of his testimony, which is supported by theories based on factual data, I believe this assertion and accepts his evidence as tendered.

According to Mr Hooi, it is necessary to first identify the catchment area selected for study. In this case it is the area related to the East Stream commencing from its source. Once the catchment area is determined the amount of water flowing into the East Stream can be calculated. To ascertain the catchment area, he followed these procedures. He personally visited the area concern. Obtained a topography map of the place and aerial photographs taken of the area in 1992 from the survey department. Secured a drainage plan (exh P18) prepared and drawn by the seventh and eighth defendants' own engineers known as HS Liao & Rakan of the entire Metrolux land. With these, he marked out the boundary of the Metrolux Site with all natural drainage found therein. Then by drawing a line to join the ridges of this zone he mapped out the catchment area. Next, by using a photograph he identified the section of this land which was cleared of vegetation. From here he formulated Figure B in his report (P44). This figure has the entire Metrolux land, Highland Towers Site, Arab Malaysian land and the immediate surrounds marked out on a plan. The area denuded of vegetation in the Metrolux land is coloured in mustard while the East Stream from its source is marked out in blue and the catchment area is delineated by a circular line. An enlargement of this plan, with all the features as described, is also displayed in his report. In his enlarged figure, A Mr Hooi subdivided the catchment area into four parts. He selected the part that contributes to the East Stream. Limiting to this section he calculated the discharge of water to the East Stream when the land is with vegetation and when it is denuded of it. He arrived at a calculation that the cleared area in this catchment contributing to the East Steam has an run-off increased by approximately 22% for a return period of two years as compared to this B part of the land covered with vegetation. By this, he concludes that 'the clearing of the land within the Metrolux boundaries which lay within the catchment had a significant contribution to the run-off entering the drainage system, and consequently to overflow into the hillside'.

C The seventh and eighth defendants' version

From the above testimonies two relevant matters are identified. The first concerns the physical condition of the Metrolux Site. The second involves the additional run-off from the Metrolux Site to the East Stream.

Concerning the physical condition, the defendants' witnesses deny the D presence of the East West Bund as observed by Mr Rickard. Miss Visanathamala (DW13), the consulting engineer in charge of earth works at the Metrolux Site at the material time, denies the existence of such a blockage. She claims that there was no necessity for such a structure since by the natural contour the land water would flow naturally to the north where it would be picked up by the main drains constructed at the lower E northern region of the Metrolux land. From here the water would be drained into Sungei Sering, situated on the other side of Bukit Antarabangsa. Miss Visanathamala then insists that when she visited the Metrolux Site, some three days after the collapse of Block 1, she noticed the Earth Retention Wall. This wall, she claims was constructed by the F contractors who excavated this section when they brought down the level from the original to a required depth. Effectively, this wall would, in her opinion block off any water run off to the East Stream.

DW15 is one Mr Lee, the consulting engineer of the Metrolux project and was Miss Visanathamala's superior. He too confirms the existence of the Earth Retention Wall which he saw constructed in September 1993 and G was still there during his monthly site meetings with the contractors.

Mr Douglas Yee (DW12) has described himself as an expert in hydrology and hydrogeology. The former is the study of surface water flow pattern over land, the amount of run-off of such water at any particular place and provisions for such run-off. The latter pertains to movement of H ground water through the soil from which a subterranean flow regime can be ascertained. Besides detail analysis on the contribution of the water run-off from the Metrolux Site to the East Stream, which I shall deal with later, this witness also confirms two things. The first is: by the nature of the surface flow pattern and the existence of the Earth Retention Wall there was no surface water run-off entering the East Stream. The second is: by the I geology of the area, ground water will flow towards the north of Metrolux land without discharging into the East Stream. In addition, this witness adds that during his site visits he observed that the originating tributary of the East Stream inside Metrolux land was dry. The other, which was close to the Metrolux boundary, had only trickles of water. The actual volume of water that contributed to the East stream was from a third tributary. This was located some distance away from Metrolux land. In short, he concludes that hardly any water from the Metrolux Site contributed to the East Stream.

After careful study of the evidence and due consideration to the theories forwarded I am of the following views:

Whether there was discharge of water from Metrolux Site to the East Stream

Firstly, from the testimony of Mr Rickard and the photographs presented there was substantial of deposits of silt and sandy materials in the East Stream close to the source at the Metrolux Site. The seventh and eighth defendants never denied this. So where did this come from when there was no other development in this catchment area that fed to the East Stream except the earthworks at the Metrolux Site?

Secondly, as to whether there existed the Earth Retention Wall before the collapse of Block, 1 Miss Visanathamala's evidence on this point is of little value. She only confirms the existence of this wall after Block 1 has collapsed, not before. Thus, she is unaware of whether this configuration was erected before the collapse of Block 1.

As for Mr Lee's (DW15) evidence which confirms the existence of this wall since September 1993, I am very skeptical. He made this statement without tendering any details of this wall. Further, by his demeanor I find him to be an unreliable witness. He seems to be exceedingly bias towards these defendants who are still his clients. This can be reflected on two occasions. The first was when asked under cross-examination as to why he thought there was silt in the East Stream he replied that it could be due to erosion in the same area. But there was clearly no development along this course of the East Stream. The next is his 'no comments' reply to a question asked during cross-examination on the creation of the silt pond at this corner of the Metrolux Site. This attitude may be due to the fact that he is still engaged by the eighth defendant as the engineer for the project and several others handled by the eighth defendant within Bukit Antarabangsa. Further, I find it unlikely that this witness visited this part of the site to observe details when he had delegated such work to his junior, Miss Visanathamala.

Against these implication of the existence of this Earth Retaining Wall is the unbiased observation of Dr Nik Ramlan who went up to this part of the Metrolux Site soon after the collapse of Block 1. He remarked that someone had 'recently' dammed the flow path from Metrolux Site 'to the Highland Towers area and had tried to stop the flow from the plateau into the channel'. This is obviously in reference to this Earth Retention Wall. This perception from an independent and knowledgeable person, whose mind was focused as an investigator to the cause of collapse of Block 1, has substantial probative value and I am incline to accept it as the truth to imply that this retention wall was a relatively new creation; not that as claimed by the seventh and eighth defendants.

Fourthly, the photographs taken by Mr Rrickard of this Earth Retention Wall as found in exh P10 speaks a lot by itself. Though the seventh and eighth defendants' witnesses argue that they represent a wall that was in existence for sometime, I doubt this claim. I am of the view that this wall, depicted in the pictures, is a recent creation of soil from another area dumped on site. It does not appear to be soil excavated from the same area by a 'cut and fill method' carried out by the contractors. Some surviving vegetation can be observed in this heap to indicate that this lot is foreign. Though erosion lines are noticeable on the surface of the soil it is not conclusive that it has been there for some substantial period of time. It could have been formed during the two months from the time of collapse of Block 1 to the time when Mr Rickard took these pictures.

Fifthly, is the noticeable absence of the eight progress earthworks report. It was the practice of the earthworks contractor at the Metrolux Site to submit progress report after certain work was carried out to the eighth defendant's engineer for verification and approval to facilitate payments for such services. Such report would reveal the amount of earth excavated and the location where it was done. By this, one can verify approximately when this Earth Retaining Wall was erected and whether this wall was made up of localized material since these defendants have claimed that this wall was erected when the contractors excavated this part of the land. This report — the eight progress report — supposed to cover the period just before the collapse of Block 1 is mysteriously missing. All other reports which are in sequence and numbered consecutively are available except progress report number eight. Even a subsequent report — number nine — is present. But why is this most crucial report — number eight — gone missing, especially when this may determine whether the Earth Retaining Wall was built at this time or much earlier? In the absence of any convincing reason other than it being lost, serious aspersion is cast on these defendants for refusing to disclose for fear that no earthwork was affected in this part of the land to support their claim that such a wall was in existence before the collapse of Block 1 and not after.

Sixthly, concerning the East West Bund, these defendants have consistently maintained that: (a) there was no necessity for such a structure since by the natural contour of the Metrolux land water would flow down hill towards the north; and (b) when it reaches downhill, main drains at the lower region of the Metrolux land would pick it up and carry it through other housing schemes in Bukit Antarabangsa before discharging into Sungei Sering.

But this is not quite the factual position as explained by Mr Douglas Yee relating to water run-off from the Metrolux Site. The two hillocks which I briefly disclosed earlier, and which I shall refer to them as the eastern hillock and the western hillock according to their position, generated water after rainfall. Water from the eastern hillock would, according to Mr Douglas Yee's water-flow chart titled 'Catchment C' as illustrated at p 6 of his report (P35), did enter the East Stream; and not completely flowing towards the north. Of course, if the Earth Retention Wall was there then this water would be prevented from entering the East Stream. Water originating from the western hillock however, would naturally flow into the East Stream as marked out under 'Catchment C2' in Mr Douglas Yee's flow chart. But this, according to him, was blocked by an earth outcrop (which may not be there at the material time of the collapse of Block 1 since this composite pictures formulating these flow charts were taken much later after the tragedy) to force the water to turn left down hill towards the north. Thus from these charts, water in the Metrolux Site did not naturally flow downhill as these defendants wish this court to believe; some flowed into the East Stream.

Secondly, if the Earth Retaining Wall had been built before the collapse of Block 1 then, to be viable and effective, there must be in existence ready-made main drains at the lower portion of the Metrolux land to receive the water coming down hill. Otherwise, water would be flowing in an uncontrolled manner to affect ongoing construction work then taking place at this lower northern section of the Metrolux land. But from the evidence tendered, no concrete main drains were constructed at this lower part of the slope. Only erosion channels were exposed from the photographs tendered; not drains as claimed by these defendants.

By these revelations, I believed that there was a need for a barrier, like the East West Bund to prevent water from flowing down hill in order not to interfere with the ongoing construction works below. With an existing avenue — the East Stream, it is probable that these defendants under these circumstances must have utilized this stream as a conveyance to discharge run-offs from their land, and in order to do so, they must have erected the East West Bund to prevent water flowing down hill onto the lower part of their land. This discharge into the East Stream added extra volume of water to this watercourse besides eroded materials from the Metrolux Site. These have contributed to the collapse of Block 1. I do not believe that there was no Earth Retaining Wall constructed to prevent such flow as claimed by the seventh and eighth defendants before the collapse of Block 1. Such claim, I find is a creation of these defendants as an afterthought to evade liability.

Contribution of water from Metrolux Site to East Stream

The material difference between Mr Hooi's opinion and that of Mr Douglas Yee is the amount of surface water run-off from the catchment area of the Metrolux Site to the East Stream just before the collapse of Block 1. In Mr Hooi's view there was an additional run-off of 22%. Mr Douglas Yee, on the other hand, feels that the additional run-off calculated on the basis of this area 'not being deforested' was only 12% and, if the said land was developed, it was 5%–6%. The greater degree of the former, he explains, was due to the steep gradient of the land which caused a higher degree of surface run-off as compared to a relatively flat surface which permitted water to concentrate in percolating into the ground.

After hearing the mass of evidence adduced to explain the concept and methodology used by these two experts in arriving at their respective opinions, I find that the difference in their conclusion lies primarily on the materials and raw data used to determine the location of the boundary of the Metrolux land. In the case of Mr Hooi, he relied on the drainage plan submitted by the consultant engineers of these defendants. For Mr Douglas Yee, he used a surveyed plan prepared by a surveyor, also engaged by these defendants. The significant difference in these two plans is that in P18 (the drainage plan) there are distinctively four originating tributaries in the Metrolux Site which flow into the East Stream. In the survey plan used by Mr Douglas Yee it shows only one with another just tipping the boundary. Indeed, as candidly admitted by Mr Hooi, if the boundary of the Metrolux land is incorrect then his calculation would be wrong. But what makes one more accurate than the other when both are, ironically, supplied by the same defendants? Of course, Mr Douglas Yee criticized P18 and declared that it is far from accurate. But by the same token, how can one be certain that the survey conducted by the surveyor, who was not called to testify and whose identity could not even be ascertained, does not contain faults. P18 was an important plan drawn and prepared by the consultant of the seventh and eighth defendants and submitted to the authorities for drainage approval. Surely the boundary of the Metrolux land would have been ascertained before it was presented for submission since it involved provisions to cater for sufficient drainage system for the entire Metrolux project. So why should it be inaccurate? In fact, the survey plan relied on by Mr Douglas Yee is suspected to be used for covering up the disadvantages to these defendants. By these reasons, I am inclined to find that Mr Hooi is not incorrect in his calculation for the run-off when he relied on P18.

Mr Douglas Yee also criticized Mr Hooi for not considering the land in the catchement area to be sufficiently flat since the terrain in this area has been excavated. By not taking into consideration this factor, he said, Mr Hooi's calculation would be incorrect. I find this accusation not justifiable. Though earthworks in the form of excavation was carried out in the area, but the land was not completely flattened. Substantial part of the land is still comparatively hilly, as displayed by the two prominent hillocks which are noticeable on the photographs as well as when this court visited the site.

Next, Mr Douglas Yee commented that Mr Hooi's usage of the aerial photograph to determine the catchment area is inaccurate. Such photograph, being black and white, would only produce shades of grey. By this method the catchment area can never be located. If this theory of Mr Douglas Yee is true then Mr Hooi would not even be able to ascertain anything except, presumably by guesswork. But after comparing the catchment area of both these experts, surprisingly, I find them to be remarkably and strikingly similar. Thus either Mr Douglas Yee is wrong in his view or Mr Hooi's guesswork is a coincidentally correct. Nevertheless since both catchment areas are relatively similar, I find this factor makes very little difference to their respective calculations.

There are other areas of differences between these two experts but I find them minor compared to the main conflict on the boundary as stated above. I shall not dwell into these since, as agreed by both experts, hydrology is not an exact science; it is based on a lot of guesswork and assumptions.

Before I conclude on the finding of facts in this area, I find it difficult to comprehend on two aspects of Mr Douglas Yee's testimony. The first was his discovery of only one originating tributary of the East Stream in the Metrolux land, which he said was dry, and another tributary nearby with only trickles of water. This is strange, for during this court's visit to the site, I observed a substantial flow of water in a tributary which seems to originate from the Metrolux land. In fact there were even some Indonesian workers, obviously engaged in the development work on the Metrolux Site, bathing there. Secondly, I did inquire as to the source of this water. Mr Douglas Yee replied that it was from the ground and extracted by an insertion of a pipe to the soil. If this is true, then firstly, Mr Douglas Yee's theory of no ground water flowing from Metrolux land into this area, except to the north, must also be incorrect. Secondly, it is very probable that this stream with abundance of water originates from the Metrolux land giving more credence that P18, which was used by Mr Hooi.

By reasons aforesaid, I find Mr Hooi's conclusion on the amount of water run-off is more probable than that presented by Mr Douglas Yee. With such increase in water run-off there was a surcharge on the Arab Malaysian land which was a factor that effectively caused the collapse of Block 1.

Preliminary issue

Having determined the facts I shall now proceed to apply it to the law. The legal principles applicable to the liabilities of negligence and nuisance have been extensively set out in the course of my analysis into the liabilities of other defendants. I do not propose to repeat them here unless necessary and relevant.

Before I proceed to discuss each of the causes of action individually, I shall first deal with an issue raised by the seventh and eighth defendants that is common to both the claims of negligence and nuisance.

This relates to the assertion by the seventh and eighth defendants during submission that they should not be made responsible for the acts of their independent contractors. According to the seventh defendant, they have granted an exclusive power of attorney to one Dato Loy to develop the Metrolux land, and Dato Loy in turn gave a power of attorney to the eighth defendant to manage the development. Instead of handling the development themselves, the eighth defendant declares that, by a power of attorney, they appointed a firm of contractors known as MBf Construction Sdn Bhd to carry out this job. Thus by these series of appointments, these two defendants argue that: they were not in possession of the land and they are not liable for the acts of their independent contractors.

Obviously, this approach is an afterthought for it was never pleaded in the statement of defence of these two defendants. In fact, on the contrary,

A as pointed out by the plaintiffs' counsel, these defendants in para 10 of their statement of defence admitted to have conducted ordinary building works on the said land. With such an admission, I do not think they can raise this issue of exemption of liability for the work done by independent contractors at this stage. To support this is my decision in *Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor* [1995] 2 MLJ 276 (at p 285)
B citing the oft-quoted judgment of Sharma J in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, which is:

> The court is not entitled to decide a suit on a matter which no issue has been raised by the parties. It is not the duty of the court to make a case for one of the parties when the party concerned does not raised or wish to raise the point.
> C In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial suit should be confined to the pleas on which the parties are at variance.

D Further, even if this issue is allowed to be raised, I am not convinced that these defendants can be exempted from the liability for the acts of their independent contractors. As a general rule, it is true that an employer of an independent contractor is not liable for the fault or negligence of such a contractor. But there are exceptions. One such exception relates non-delegable duty. This covers 'all cases involving extra hazardous acts or
E omissions, or situations created by them, which all involve special danger to others' — Supreme Court decision in *Datuk Bandar Dewan Bandaraya v Ong Kok Peng & Anor* at p 239. It is my view that to carry out development work on any land for that matter is normal and not hazardous, but when the land to be developed is perched high on a hill with a populated community below, then the situation is different — an extra hazardous situation will be
F created if such development work is carried out. This is even more serious if the hill is to be stripped bare of vegetation and its natural water courses unattended. Worse, if there is to be a diversion of watercourses downhill. The extra hazard here is the surcharge of water and silt deposits to cause drains to clog resulting in overflow that may consequent in slope failure
G downhill to affect lives and properties. The factual situation in our present case is the very case in point. Thus, under such circumstances, these defendants are not exempted from the liabilities for the acts of their independent contractors.

This proposition is not limited to a claim of negligence. It similarly applies to nuisance as is noted in the case of *Matania v The National*
H *Provisional Bank Ltd & Anor* [1936] 2 All ER 633. In this case the complaint made by the plaintiff was dust and noise caused by the building operations of the defendants. The court decided that although one of the defendants had employed an independent contractor, this defendant is still liable in damages for nuisance caused because the very nature of the work carried
I out involved a risk of damage to the plaintiff.

The next issue is the argument by Dato Sethu, leading counsel for these two defendants, that the plaintiffs have no right to bring this action for negligence against these defendants because the plaintiffs are not persons who were the proprietors or in possession of property that was damaged ie Block 1. In short, what he meant is that a plaintiff cannot sue for negligence if the act or omission of the defendant did not directly injure the plaintiff's person or property — but only caused consequential loss. In such situation, according to him, there is no duty owed by these defendants to the plaintiffs. In support of this proposition, he cited a number of cases, all of which, adhered to the principle originated from the case of *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453. This principle is best explained by Scrutton LJ in *Elliott Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB 127 at p 139 as follows:

> At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use of services of the chattel for purpose of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right.

Looking at this closely, this proposition concerns pure economic loss of which I need not, as expressed in the earlier part of this judgment, elaborate since I am reaffirming my views stated in the case of *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants*. However, as this argument of Dato Sethu touches on another aspect of the concept of pure economic loss, I shall proceed to analysis it, though the ultimate result is similar to what I have stated in *Dr Abdul Hamid Abdul Rashid.*

Pure economic loss, as can be deduced from the dictum of the cases above, refers to financial loss suffered by a plaintiff which is unconnected with, and does not flow from damage to his own person or property. The learned authors in *Clarke & Lindsell on Tort* (17th Ed), have classified four different ways in causing such loss. The first is where the loss to the plaintiff follows physical damage to property in which he has no proprietary interest at the time of the damage but to which he has some relationship. The second is where causation is through the negligent provision of services. The third is causation through reliance by the plaintiff on a statement (as is the *Hedley Byrne* type of situation). And the final category involves defective products or buildings with which the plaintiff has expended money on repairs or replacement. *Dr Abdul Hamid Abdul Rashid*'s case falls within the second group and going by the facts presented our present case should be in the first classification.

The rational behind this restriction and leading to the creation of this terminology of 'pure economic loss' is the fear of opening 'an exceeding wide field of claims', or creating 'endless indeterminate liability', or ' the overkill may present its own disadvantages'. A summary of all this is classically expounded by Cardozo CJ in the American case of *Utramares v Touche* (1931) 255 NY 170 — to prevent a floodgate and avoid the creation of liability 'for an indeterminate amount for an indeterminate time to an indeterminate class'. A factual hypothesis of this is best illustrated in a passage of the judgment of Lord Penzance in *Simpson & Co v Thomson* (1877) 3 App Cas 279 where he disclosed that:

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> ... if, by negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself by contract to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction. But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend to him and provide medicines to him for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in this patient's safety. In like manner an actor or singer bound for a term to a manager of a theatre is disable by a wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexities of mutual relation is daily created by contract, might be both numerous and novel.

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But his principle often produced unfair results. A case in point relating to pure economic loss in a physical damage to property situation is *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd & Anor* [1986] AC 1. Here the first plaintiff is the owner of a vessel known as 'The Ibaraki Maru' which was let out on a 'bareboat charter' to the second plaintiff. Effectively this puts the second plaintiff in possession of the boat. The second plaintiff then re-lets the vessel to the first plaintiff on time charter, which does not confer possession. In an accident the vessel was damaged by the defendant's ship. While the second plaintiff can recover the cost of repair from the defendant, who was found negligent for the accident, the claims by the first plaintiff for the hire charges paid by the first plaintiff, even when the vessel was out of action, and for revenue which the first plaintiff lost for being unable to use the vessel were rejected. All this was due to the fact that the first plaintiff, in law, was not in possession (or for that matter not the owner) of the vessel. Before the Privy Council on appeal it was argued that the first plaintiff was indeed the owner, but this contention was rejected on ground that for the two items claimed, the loss suffered by the first plaintiff was in its capacity as charter, not as owner.

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This approach has caused grave concern to some Commonwealth law practicing countries. Though having provided 'a mechanical and fairly easily applied test for the resolution of disputes (and hence for the avoidance of prolong litigation)' as eloquently pointed out by Mr WH Roger, the author of *Winfield & Jolowicz* (15th Ed), this strict rule had produced unjust results. For this, the Canadian Supreme Court in the case of *Canadian National Rly Co v Norsk Pacific Steamship Co Ltd* (1992) 91 DLR 289, in a factual situation similar to this category of classification of pure economic loss, announced that liability should be imposed based on the test of foreseeability of loss to an identifiable plaintiff and 'proximity'. McLachlin J announced this approach in this manner:

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> comprehensive ... consideration of proximity requires that the court review all the factors connecting the negligent act with the loss; this includes not only the relationship between the parties but all forms of proximity — physical, circumstantial, casual or assumed indicators of closeness. While it is

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> impossible to define comprehensively what will satisfy the requirement of proximity or directness, precision may be found as types of relationships or situations are defined in which the necessary closeness between negligence and loss exists. A

I am of the view that this approach is fair and equitable and should be adopted. I have in *Dr Abdul Hamid Abdul Rashid* 's case furnished my reasons to rally against the fear of the creating 'endless indeterminate liability'. I shall not repeat all of it here but for those readers who wish to be acquainted with it, reference can be made to the said case. All that is required of me now is to reproduce only a small passage from the said judgment of my views on this subject (which has not changed, but instead strengthened) for application to the facts of this case. It is (at p 564): B C

> With these arguments, one wonders why there is such limitation imposed upon a claim for pure economic loss, for after all the entire concept of negligence is to extend liability beyond the borders of privity. To impose such a restriction is highly inequitable particularly in cases where the duty of care and the breach of such duty are found to be substantiated.

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With this, I do not agree with this contention of Dato Sethu and shall resort to determine liability of the seventh and eighth defendants base on foreseeability and proximity to ascertain whether these defendants owe a duty of care to the plaintiffs, to be followed by whether this duty was breached resulting in damages.

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Analysis — negligence

On the factor of foreseeability, this court is required to decide whether the seventh and eighth defendants did reasonably foresee that their acts would cause damage to the plaintiffs. After examining all the evidence adduced, my answer is in the positive. As property developer and/or manager of development projects on a hill, these defendants must have known or ought to have known that by diverting watercourses on their land to the East Stream they would increase the volume of discharge to this outlet. With an extensive area of their land denuded of trees, they must have foreseen that water flowing over this area would carry with it eroded soil and silt which would be deposited downstream. And as proved, these caused or contributed to the failure of the drainage system resulting in the collapse of Block 1 and forced evacuation of Block 2 and 3. F G

As to the question of proximity, Dato Sethu alludes that there was insufficient proximity between the plaintiffs and the defendants to create such a duty of care. He says there was no immediate physical closeness between the Metrolux land with Arab Malaysian land and Block 2 and 3. The Metrolux land, he stresses, was some distance away from both the Arab Malaysian land and the Highland Towers Site. In fact, from the layout plan, various intervening lots belonging to other individuals separated them. H

Though this is true but under the principle of *Donoghue v Stevenson* proximity is not confined to physical proximity. In the words of Lord Atkin (at p 581): I

> … (it) extend(s) to … close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

The act complained of was the division of water and silts from the Metrolux land into the East Stream which caused the water to overflow onto the slope of the Arab Malaysian land resulting in the failure of the retaining wall that triggered off a landslide which eventually brought down Block 1 and forced the plaintiffs to evacuate Block 2 and 3. Though the location of the originating cause was some distance away from the ultimate effect of the cause, these two were closely and directly related. In this instance, we are concerned with the element of water that traversed lands that caused no loss to the immediate physical neighbours but drastically to those some distance away. But when one retraces the origin of this effect it relates to the acts of these defendants as the cause. With such close and direct connection between cause and effect, I am satisfied that the plaintiffs have proved proximity to both the acts complained of and the parties concerned.

Dato Sethu's next submission relates to the common law rule that an occupier of land situated at lower stream has no ground of complaint, or cause of action, against an occupier whose land is at the upper section for permitting water that has come naturally onto his land to pass it onto his neighbour's land downstream. The case of *Smith v Kenrick* [1843–60] All ER Rep 273 is cited in support. But this rule, by established authorities, only applies when there is no artificial barrier built and diversion affected to the water. As succinctly put by Mr Piers Ashworth QC, sitting as a deputy judge of the High Court, in *Home Brewery plc v William Davis & Co (Loughborough) Ltd* [1987] 1 All ER 637:

> There can be no doubt that an occupier of land has no right to discharge onto his neighbour's land water that he has artificially brought onto his land (*Baird v Williamson* (1863) 143 ER 831) or water that has come naturally onto his land but which he has artificially, even if unintentionally, accumulated there (*Whalley v Lancashire & Yorkshire Rly Co* (1884) 13 QBD 131) or which by artificial erections on his land he has cause to flow onto his neignbour's land in a manner in which it would not, but for such erections, have done (*Hurdman v North Eastern Rly* [1874-80] All ER Rep 735). If an occupier does any of these things he is liable to an action at the suit of his neighbour. Furthermore, if he brings water onto and accumulates it on his land he may well be liable to his neighbour if that water escapes, even though he has no wish to discharge it and has taken every precaution against discharging it (*Rylands v Fletcher* (1868) LR 3 HL 330).

In the factual matrix of our case, the water at the Metrolux Site was naturally on the land but these defendants had artificially erected barriers on their land to redirect its natural flow path into the East Stream which consequently caused the damage suffered by the plaintiffs. Such acts of these defendants are closely and directly connected to the damage and for this, the seventh the eighth defendants must be liable to the plaintiffs.

Proceeding further, Dato Sethu submits that the plaintiffs, not being riparian owners of the East Stream, cannot complain of the flow of water on the East Stream or of any diversion caused. For this, he cited the case of

A *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] 1 All ER 1326 which decided that a 'riparian right is a claim by a riparian proprietor of land to the enjoyment of a natural stream flowing through his land. If water is polluted and his enjoyment in the natural flow of the stream is affected thereby, he may have a cause of action against the polluters.'

B I find this proposition of Dato Sethu is of no relevance to the present claim of the plaintiffs. I wish to emphasize that we are not discussing about a claim by the plaintiffs as riparian owner of the East Stream against the defendants for polluting this stream. The plaintiffs' claim against these defendants is for negligently creating a danger which they could reasonably foresee would cause damage to the plaintiffs.

C By my aforesaid reasoning, I find the seventh and eighth defendants owe a duty of care to the plaintiffs. Having decided on this, I shall proceed to determine whether this duty of care was breached.

D The acts of the seventh and eighth defendants have been extensively discussed and elaborated warranting no necessity for repetition. From them I am of the view that these defendants have breached this duty of care they owe to the plaintiffs. My reasons are contained in my deliberation of the many issues raised by these defendants and again repetition is not necessary. As damages have resulted due to the acts of these defendants, I find negligence proved against the seventh and eighth defendants.

E

Analysis — nuisance

F Towards the claim of nuisance, the seventh and eighth defendants insist that they are natural users of their land within the meaning as explained in the beginning section of this judgment. To support this, they highlighted the fact that the plaintiffs, as downstream user of the East Stream, have no rights to complain against the act of an owner living upstream. The case of *Palmer v Bowman* [2000] 1 All ER 22 is cited to justify this contention. Generally, as I have expressed earlier on this aspect of the law, this is not incorrect. But by artificial changes to the source of the stream which affected the nature flow of water then going by the principle as detailed by G Mr Piers Ashworth QC in *Home Brewery plc v William Davis & Co (Loughborough) Ltd* (which was cited with approval in *Palmer v Bowman*), the defendants are not exempted from causing nuisance. In this case, the erection of the East West Bund by the seventh and eighth defendants had diverted more water to flow into the East Stream and carried with it eroded H soil to create a series of consequences that lead to the collapse of Block 1 and the forced abandonment of Block 2 and 3. By this very act, I find the seventh and eighth defendants are not reasonable users of their land.

On the foreseeability factor required to constitute actionable nuisance, the seventh and eighth defendants avert that they could not have reasonably foreseen during the course of their act that their act would result in damages I to the plaintiffs. Since the test on foreseeability is similar to that in negligence, and that I have already scrutinized it against the facts of this case, there is no requirement for me to restate except to reconfirm my finding that these defendants did or ought to have foreseen that their acts would cause damage to the plaintiffs.

Having found the seventh and eighth defendants being unreasonable users of their land, as well as they being able to foresee that their act would injure their neighbour — the plaintiffs, these defendants are liable to the plaintiffs for nuisance.

The ninth & tenth defendants

The plaintiffs' claim

The plaintiffs' claim against the ninth and tenth defendants for both negligence and nuisance is based on the following: Firstly, these defendants are and, at all material time, were the owners of the East Stream and responsible for the care and management of this watercourse as well the drainage system in the Highland Towers Site, Arab Malaysian land and the surrounding areas. Secondly, JPS, as a department of the ninth defendant in charge of drainage and irrigation, had involved itself in the drainage problems of the Highland Towers Project since inception. Thirdly, by the acts and/or omissions of JPS, as disclosed from the chronology of events concerning the development of the Highland Towers Project, these defendants in allowing the first, second and third defendants to proceed with the building of Highland Towers and consenting to the issuance of CF for Block 1 and 2 before the drainage issue in the area was settled committed negligence and nuisance resulting in damages to the plaintiffs.

Further, the plaintiffs insist that these defendants as owners and/or occupiers of certain portion of the Arab Malaysian land had committed the same negligence and nuisance as described above. This allegation is deducted from the following. According to Mr Navaratnam, when the lands on Highland Towers Site and the Arab Malaysian land were sub-divided on the application of the first defendant, there were areas required for road reserves. Such reserves, upon issue of the individual documents of title subsequent to the sub-division, were deemed to have been surrendered to the State Authority under s 136(2)(a)(ii) of the NLC. And since the State Authority owns the surrendered lands, the plaintiffs insist that the ninth defendant, representing the State Authority, should have taken reasonable care to ensure that drains and retaining walls thereon would not cause damage to its neighbours. This they have failed resulting in damages to the plaintiffs.

Preliminary points raised by the ninth and tenth defendants

Wrong party named

There are a number of preliminary points raised by the ninth and tenth defendants which should be disposed off before this court ventures into a discussion of the substantive matter. If they are valid, then there is no necessity to proceed further.

The first, concerns the citation of the wrong party. Dato Mohd Zawawi, State Legal Advisor of Selangor, representing the ninth and tenth defendants, contends that there is a difference between the entities: 'Government of the State of Selangor' (the ninth defendant), the 'Ruler of the State' and the 'State Authority'. He supports it with these provisions: A

Section 3 of the Waters Act reads: B

> Subject to the terms of any express grant made by or on behalf of the Ruler of a State, *the entire property in and control of all rivers in any State is and shall be vested solely in the Ruler of such State*; provided that in the case of lands held by the Government under grant or lease or reserved for a public purpose and maintained by a Government Department, *such control may be exercised by the Head of such Department, under the direction of the State Authority.* (Emphasis added.) C

This is fortified by s 49 of the NLC which states:

> *Where the shore-line or the bed of any river advances so as to encroach on any alienated land, the area affected by the encroachment shall thereupon cease to form part of that land, and shall become State land*; but the boundaries of alienated land shall not (except in circumstances mentioned in paragraph (ii) of the proviso to subsection 2 of section 353) be affected by any retreat of the shore-line or of the bed of any river. (Emphasis added.) D

Then by virtue of s 16(2) of the NLC:

> Any action, suit or other proceedings relating to land in which it is sought to establish any liability on the part of the *State Authority* shall be brought against the State Director in the name of his office. (Emphasis added.) E

By these provisions, Dato Zawawi argues that all rivers (which by definition under the NLC includes streams and watercourses) are vested in the Ruler of the State, and the control of them is under the direction of the State Authority, and if any action is to commence against any party in respect of them it should be the State Director. To support this, the case of *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1995] 3 CLJ 114 is cited. In that case Mohd Ghazali J disagrees that a 'State Government' is synonymous to a 'State Authority'. Thus when a State Authority is the responsible party in an action, the correct person to be named as the defendant is the State Director. F G

I believe that this is the correct approach. But for the purpose of this case, in respect of claims arising out of rivers, streams or watercourses, very little difference is made since the State Director, who is the tenth defendant, is already a party in this action. However concerning matters arising out of the ownership and/or occupier of the surrendered lands, the situation is different. The plaintiffs have not in their pleadings alleged that the tenth defendant is the person being sued for this particular aspect of the claim. The plaintiffs' statement of claim repeatedly and distinctively asserts that the tenth defendant is brought in as a party to this suit 'by virtue of the fact that the property in stream and watercourses on Arab Malaysian land and its surroundings is vested in the State Authority of Selangor'; never as a State Director to the surrendered lands. H I

A Thus, based on the aforesaid principle, the claim of the plaintiffs against the ninth defendant must failed in respect of drainage matters but maintainable against the tenth defendant. But for the surrendered lands, the plaintiffs' claim must fail against both these defendants.

B *Particular officer or officers not named*

The second attack mounted by Dato Mohd Zawawi is that by the provisions of ss 5, 6(1), 6(4), and 18 of the GPA the particular officer or officers in the Government who committed the tortuous wrong must be identified otherwise the claim against the tenth defendant must fail. To comprehend this, pertinent parts of the sections mentioned must be highlighted.

C Beginning with, s 5 of the GPA (which provision has been produced earlier but reproduced once more to facilitate easy and quick understanding) states:

> D Subject to this Act, the Government shall be liable for *any wrongful act done or any neglect or default committed by any public officer* in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government. (Emphasis added.)

E Section 6(1) of the GPA is as follows:

> No proceeding shall lie against the Government by virtue of section 5 in respect of *any act, neglect or default of any public officer*, unless proceedings for damages in respect of such act, neglect or default would have *lain against such officer personally*. (Emphasis added.)

F Section 6(4) of the GPA requires that:

> No proceedings shall lie against the Government by virtue of section 5 in respect of *any act, neglect or default of any public officer*, unless that officer was at the material time employed by the Government … . (Emphasis added.)

G Section 18 of the GPA says:

> Subject to this Act, the written law relating to procedure shall apply to civil proceedings by or against the Government in the same way as to suits between subject and subject.

H To strengthen his argument, Dato Mohd Zawawi cited the case of *Hj Abdul Rahman v Government of Malaysia & Anor* [1966] 2 MLJ 174 at p 175, where Abdul Aziz J (as he then was) ruled that ss 5, 6(1), 6(4) of the GPA, 'contemplate(s) that the identity of the officer must be ascertained and the liability of the officer must be established before the Government can be made liable.'

I Mr Navaratnam refusing to concede, brought to my attention the judgment of Chang Min Tat J (as he then was) in the case of *Lai Seng & Co v Government of Malaysia & Ors* [1973] 2 MLJ 36 at p 38 where, while not disagreeing the need to name the officer involved offers this:

> Section 5 renders the government liable for tort by any public officer. Section 6(1) limits the action to those torts which 'would have lain against such officer personally,' while s 6(4) defines such public officer as someone employed at the material time by the government and paid out of revenues or appropriate funds. With every respect, it does not seem that on a proper reading, these sections can be construed as laying down strict rule of practice of proceedings against the government, failure to observe which would incapacitate the action. It is correct, I concede, that in an action for tort, the proper defendant is the wrong doer but the person who is liable for the acts of the wrong-doer or to whom the liability for injury has passed is also a proper defendant, and for myself, I would adopt the attitude of Viscount Simon,
>
> > 'the courts before whom such a case as this comes have to decide it as between the parties before them.'
>
> in *Adams v Naylor* which is a case for damages for negligence but which must now be read subject to the qualification that since then the Crown Proceedings Act 1947 has come into force.

With the greatest of respect, I cannot quite appreciate the rational behind Chang J's view in the aforesaid case, particularly in adopting a single phase of 'just between the parties before them', by Viscount Simon in *Adams v Naylor* [1946] AC 543 to imply, somewhat, that it is permissible to sue the government without any particular officer of the Government being specified. On the contrary, the emphasis by Viscount Simon was on the need to determine the liability of the government officer involved in the negligent act. When this is the requirement then it weights heavily on the need to name the officer or officers involved in the alleged tortuous act before liability can be attributed to the government. This was the approach adopted by Aziz J in *Hj Abdul Rahman*. Viscount Simon best explains the rational behind this in *Adams v Naylor* at p 550 in the following manner:

> The question whether he is personally liable is of course a question for the court on evidence. But it is to me somewhat surprising and, I think, misleading, to refer him, as the evidence does, as the 'nominal' or 'nominated' defendant. Such language seems to suggest that the issues at trial are really issues between the plaintiffs and the Crown and that the defendant mentioned as a party merely as a matter of convenience. That is not the true position. The court before whom such a case as this comes have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant. For the plaintiff to succeed, apart from the statute, they must prove that the defendant himself owed a duty of care to the plaintiffs and has failed in discharging that duty. Whether the plaintiff in the present case would succeed in doing this it is superfluous to inquire, since the decision goes against them on other grounds; but it may be useful to put on record, in passing, that the success of the plaintiffs would depend on establishing the personal liability of the defendant to them, as the Crown is not in any sense a party to the action.

When there is a necessity to first decide whether a particular officer or officers, as the case may be, is negligent or has committed a tortuous wrong, before the Government can be held liable, then it is absolutely necessary and essential to identify and name the particular officer or officers whom the

A plaintiff alleged committed the negligence or tortuous wrong. If he is not liable then the government is also exempted from liability. This is the concept of vicarious liability under common law. In this situation we have even statutory provisions to affirm this approach where they continuously assert and declare the need to determine fault of the particular officer before the government can be held liable. This clearly implies a need to identify B and distinguish the officer or officers concerned before the plaintiffs can proceed with attributing liability to the government. In the situation at hand, only the drainage and irrigation department was named in respect of matters related to drainage. This is a department operated by officers. Who then was the officer or officers who committed the act or omission? Without C him being specified and singled out how could liability against him be ascertained, Without the determination of his liability how could the tenth defendant be found liable. Similarly in respect of other acts or omissions involving the surrendered lands no individual was specified or mentioned, not even the particular department of State's machinery. Such defects, in my opinion are too serious and fundamental for such proceedings against D the Government to succeed; it must fail for non-compliance of the legislative provisions laid down for such action against a State Government.

By the reasons above, I hereby rule that the plaintiffs' claim against the ninth and tenth defendants must fail. With this, there is no compulsion for me to proceed into the field of the substantive issues.

E

Apportion of liability and contribution

When damage is caused as the result of torts committed by two or more tortfeasors, the tortfeasors my be jointly and severally liable for causing the same damage — see para 4–54 of *Clerke & Lindsell on Tort* (17th Ed). Dato F Sethu, arguing for and on behalf of the eighth and ninth defendants, raises two points in respect of this subject. The first relates to the distinction between contribution and apportionment; the second concerns the requirement of each defendant to make specific claim against each other for contribution.

G For the first, Datu Sethu insists that this court must determine whether the tortuous acts of the defendants relate to the same damage or different damages. If they are for different damages then contribution cannot apply since s 10(1)(c) of the Civil Law Act 1956 ('the Act') confines to only the same damage. Section 10(1)(c) of the the Act provides as follows:

> H Where damages is suffered by any person as a result of a tort (whether a crime or not) —
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the *same damage*, whether as a joint tortfeasor or otherwise, so, I however, that no person shall be entitled to recover contribution under this section from any person entitles to be indemnified by him in respect of the liability in respect of which the contribution is sought. (Emphasis added.)

From the evidence tendered, I am without doubt that all the defendants, except number six, nine and ten, are joint tortfeasors in causing the same damage to the plaintiffs. For this, contribution can be recovered from each other.

As regards to the second issue raised, I note that throughout the hearing of this suit in respect of liability, each of the defendants who appeared had accused the other defendants (except when they are closely associated with each other, like the seventh and eighth defendants, and the ninth and tenth defendants respectively) of negligence and/or nuisance. This was taken during cross-examination and submission. By this, I am satisfied that this constituted demands for contribution from each other under s 10(1)(c) of the Act.

And by the powers conferred upon me under s 10(2) of the same Act which reads as:

> In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extend of that person's responsibility for the damage, and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

I hereby announce the following apportionment of contribution after taking into consideration of the factors stated in this provision.

First defendant: g	15%
Second defendant:	10%
Third defendant:	10%
Fourth defendant:	15%
Fifth defendant:	30%
Seventh and Eighth defendant:	20%

There shall also be costs to the plaintiffs to be paid by all defendants except to the sixth, ninth and tenth defendants where, for the latter two defendants costs shall be paid to them by the plaintiffs.

Conclusion

With this, I conclude the issue of liability between the parties. Assessment of damages can now proceed.

Order accordingly.

Reported by Jafisah Jaafar